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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH FEOLA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Apps. A and B, *infra*) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1973 (App. C, *infra*). On December 11, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to violate a federal law, it is necessary to prove the defendant's knowledge of a jurisdictional element, when such knowledge need not be shown in a prosecution for the underlying substantive offense.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more that $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 111 provides:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more that $5,000 or imprisoned not more than three years, or both.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, re-

spondent and three co-defendants were convicted of assaulting federal narcotics officers while the officers were engaged in the performance of their official duties, in violation of 18 U.S.C. 111, and of conspiring to commit that offense, in violation of 18 U.S.C. 371.[1] Respondent was sentenced to imprisonment for one to four years on the conspiracy count, to be followed by a three year probation term on the substantive charge; he was also fined $3,000 on the substantive count. On appeal, the court of appeals initially reversed both convictions (App. A, *infra*). Thereafter, upon rehearing, it reinstated the conviction on the substantive count (App. B, *infra*). This petition seeks review of the reversal of the conspiracy conviction.[2]

1. The prosecution arose from a scheme hatched by respondent and his co-defendants to defraud or rob prospective purchasers of heroin. Unknown to the conspirators, their intended victims were undercover federal narcotics agents.

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[1] Petitioner's three co-defendants, Enriquito Alsondo, Henry Rosa, and Michael Farr, were also convicted on both counts. In addition, Alsondo was also convicted of carrying a deadly weapon during the commission of a felony, in violation of 18 U.S.C. 924(c)(2).

[2] While the court below also reversed the conspiracy convictions of respondent's three co-defendants (co-defendant Farr's appeal was prosecuted separately—see *United States* v. *Farr*, C.A. 2, No. 73–1797, decided November 19, 1973), we do not petition for a writ of certiorari in those cases because the three co-defendants were given concurrent prison terms on the substantive and conspiracy counts. Co-defendant Farr is petitioning the court to review the substantive conviction under Section 111. *Farr* v. *United States*, No. 75–953.

On August 21, 1971, narcotics agent Hall, while working in an undercover capacity, met co-defendant Farr through an informer. Hall agreed to purchase a kilogram of heroin, to be supplied by respondent. Several days later, Hall, undercover agent Lightcap, the informer, and co-defendants Rosa and Farr went to a Manhattan apartment where, the agents were told, co-defendant Alsondo and respondent would be waiting to transact the sale. Hall displayed a roll of bills, which he claimed to be the $17,000 purchase price. Alsondo, Rosa, and Farr then took Hall and the informer into the apartment bedroom, where they displayed packages of white powdered sugar, which Alsondo said was heroin.

At this point, Farr, Rosa, and Alsondo left the room, whereupon Hall, on opening a closet door, discovered a man gagged and bound.[3] Hall then proceeded to the hallway, where he observed Alsondo begin to pull a revolver from his rear waistband. Hall shouted a warning to Lightcap, and they identified themselves as federal agents. After a scuffle, the two agents managed to subdue Alsondo; Lightcap then went into the living room, whereupon Rosa threw himself at the agent as if to flee. Rosa was apprehended, along with Farr, who had remained in the kitchen. Respondent, who had been portrayed to the agents as the supplier of the drugs, was discovered hiding in a closet and was also arrested.[4]

[3] That man was later determined to be the apartment tenant.

[4] Respondent's address book, seized upon his arrest, contained the telephone numbers of Alsondo, Farr, and the Manhattan apartment in which the attempted robbery of the federal agents occurred.

2. The conspiracy count was submitted to the jury on the theory that an agreement among the defendants could be inferred under which they would either defraud the agents by selling sugar for $17,000, or assault and rob the agents should the fraud be discovered.[5] Without objection, the trial court instructed the jury that it was not necessary on either count for the government to prove that respondent or his co-conspirators knew that their victims were federal officers. Although it recognized that knowledge that the victim of an assault is a federal officer is not essential for a substantive conviction under 18 U.S.C. 111, the court of appeals nonetheless ruled, *sua sponte,* that such knowledge was required to support a conviction for *conspiring* to assault a federal officer.

The court believed that this conclusion was compelled by its 1941 decision in *United States* v. *Crimmins,* 123 F. 2d 271 (L. Hand, J). In that case, the Second Circuit had held that, even though a defendant could be guilty of causing the interstate transportation of stolen securities without knowing of their interstate transportation, such knowledge was required to support a conviction for *conspiring* to transport stolen securities in interstate commerce. In the instant case, the court of appeals said (App. A, *infra,* p. 23):

> *Crimmins* and its progeny mandate the view that specific knowledge of the official federal capacity of assault victims must be proved to

[5] Of course, a conspiracy, being secretive in nature, need not be proven by direct evidence but may be inferred from circumstantial evidence. *Glasser* v. *United States,* 315 U.S. 60, 80.

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> establish conspiracy to violate Section 111, though such proof is unnecessary to convict for the substantive offense. * * *

Although the court recognized that "[t]he *Crimmins* rationale has been criticized * * *" (App. A, *infra*, p. 22), it nevertheless accepted *Crimmins* as controlling precedent, albeit "somewhat reluctantly" (App. A, *infra*, p. 24).[6]

REASONS FOR GRANTING THE WRIT

It is wholly illogical to require knowledge of a federal jurisdictional element in a conspiracy prosecution, when such knowledge need not be shown in a prosecution for the underlying substantive offense. Whatever state of knowledge must be proved to establish perpetration of the substantive offense, proof of the same state of knowledge, together with proof of an agreement to do acts constituting the substantive offense and an overt act in furtherance of that agreement, should suffice in a conspiracy prosecution. The creation of a different and more burdensome standard of proof with respect to this element for conspiracy charges distorts and misapplies the philosophical underpinnings of the offense of conspiracy and its accepted role in the overall scheme of American criminal jurisprudence.

[6] In its first opinion, the court below also reversed respondent's substantive conviction under Section 111. Because respondent had not personally participated in the assault upon the agents, the court reasoned that his liability rested solely upon the principle that a conspirator is liable for the acts of his co-conspirators done in furtherance of the illicit plan. See *Pinkerton* v. *United States*, 328 U.S. 640, 647. A "*Pinkerton* instruction" had been given the jury. Since the court deemed the conspiracy conviction to be invalid, it held that the substantive conviction based upon the conspiracy charge similarly had to fall (App. A, *infra*, p. 26). On reconsideration of this issue on rehearing, the substantive assault conviction of respondent was affirmed (App. B, *infra*). The court noted in its second opinion that although respondent, under *Crimmins*, could not be guilty of a federal conspiracy to assault federal officers, he was nonetheless guilty as a joint criminal venturer of assaulting certain individuals, and thus, being legally responsible for the acts of his co-venturers, he was guilty of the substantive assault upon federal officers, which requires no specific knowledge of the victims' status.

The *Crimmins* rule was promulgated by a distinguished jurist, who was misled by a seductive analogy. Although it has been criticized by commentators[7] and has been rejected in some circuits, it has been retained in others out of respect for that jurist's formidable reputation. Because the circuits are in conflict over the continued validity of the rule and because it imposes a serious, irrational and unnecessary burden on federal conspiracy prosecutions, review by this Court is warranted.

1. There is a conflict among the circuits that should be resolved by this Court. The *Crimmins* rule is old, but it has not been universally followed. The Fifth, Sixth and Eighth Circuits have followed *Crimmins* and require proof of knowledge of the jurisdictional element in conspiracy cases, even though such knowledge is not an element of the substantive offense. See *United States* v. *Iacovetti*, 466 F. 2d 1147 (C.A. 5); *United States v. Cimini*, 427 F. 2d 129 (C.A. 6); *Nassif* v. *United States*, 370 F. 2d 147 (C.A. 8).

[7] *E.g.*, *Developments in the Law, Criminal Conspiracy*, 72 Harv. L. Rev. 920, 938–940 (1959).

The Third, Seventh and Ninth Circuits have rejected the *Crimmins* rule. See *United States* v. *Iannelli*, 477 F. 2d 999 (C.A. 3), petition for a writ of certiorari pending, No. 73-64; *United States* v. *Polesti*, No. 73-1294, decided August 21, 1973 (C.A. 7), petition for writ of certiorari pending, No. 73-5489;[8] *Wilkerson* v. *United States*, 41 F. 2d 654 (C.A. 7), certiorari denied, 282 U.S. 894; *United States* v. *Roselli*, 432 F. 2d 879 (C.A. 9), certiorari denied, 401 U.S. 924.

2. Federal courts have uniformly held that knowledge that an assault victim is a federal officer need not be shown in a prosecution under 18 U.S.C. 111. See *United States* v. *Maynard*, 452 F. 2d 1087 (C.A. 1); *United States* v. *Ulan*, 421 F. 2d 787 (C.A. 2); *United States* v. *Goodwin*, 440 F. 2d 1152 (C.A. 3); *United States* v. *Wallace*, 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Young*, 464 F. 2d 160 (C.A. 5); *United States* v. *Kiraly*, 445 F. 2d 291 (C.A. 6), certiorari denied, 404 U.S. 915; *United States* v. *Ganter*, 436 F. 2d 364 (C.A. 7); *United States* v. *Leach*, 429 F. 2d 956 (C.A. 8), certiorari denied, 402 U.S. 986 (*dictum*); *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9). Moreover, the courts of appeals have consistently rendered similar rulings

[8] *Polesti* was decided in an unpublished order (a copy of which we are serving on respondent's counsel) and is therefore not necessarily controlling on other panels of the Seventh Circuit. It is clear, however, that it reflects the law of that circuit. Thus, in *United States* v. *Thompson*, 476 F. 2d 1196, the Seventh Circuit strongly criticized *Crimmins*, although it did not find it necessary at that time explicitly to reject it, because the proof in the case showed knowledge of the jurisdictional element.

with respect to numerous other offenses requiring the presence of an interstate commerce or federal property nexus, some examples of which are set forth in the footnote below.[9]

[9] 18 U.S.C. 2312 (interstate transportation of a stolen vehicle knowing it to be stolen): Knowledge by a defendant that he crossed state lines is not necessary. *Bibbins* v. *United States*, 400 F.2d 544 (C.A. 9)

18 U.S.C. 2313 (receiving stolen vehicle moving in interstate commerce knowing it to have been stolen): Proof of knowledge that the vehicle has moved across state lines is not necessary. *Overton* v. *United States*, 405 F.2d 168 (C.A. 5); *Pilgrim* v. *United States*, 266 F.2d 486 (C.A. 5); *Brubaker* v. *United States*, 183 F.2d 894 (C.A. 6); *United States* v. *Hamilton*, 456 F.2d 171 (C.A. 3), certiorari denied, 406 U.S. 947.

18 U.S.C. 2314 (interstate transportation of stolen goods knowing them to be stolen): Knowledge that the goods crossed state lines is unnecessary. *United States* v. *Kierschke*, 315 F.2d 315 (C.A. 6); *United States* v. *White*, 451 F.2d 559 (C.A. 6), certiorari denied, 405 U.S. 1071; *United States* v. *Mingoia*, 424 F.2d 710 (C.A. 2); *United States* v. *Strauss*, 443 F.2d 986 (C.A. 1), certiorari denied, 404 U.S. 851; *United States* v. *Masters*, 456 F.2d 1060 (C.A. 9); see *United States* v. *Tannuzzo*, 174 F.2d 177 (C.A. 2), certiorari denied, 338 U.S. 815 (predecessor statute).

18 U.S.C. 2315 (receiving goods moving as part of interstate commerce knowing them to be stolen): Knowledge that the goods were moving in interstate commerce is unnecessary. *Pugliano* v. *United States*, 348 F.2d 902 (C.A. 1), certiorari denied, 382 U.S. 939; *United States* v. *Allegretti*, 340 F.2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *Corey* v. *United States*, 305 F.2d 232 (C.A. 9), certiorari denied, 371 U.S. 956.

18 U.S.C. 2113(c) (receiving money taken from a federally insured bank): Knowledge that the money was from a federally insured bank is unnecessary. *Nelson* v. *United States*, 415 F.2d 483 (C.A. 5), certiorari denied, 396 U.S. 1060.

18 U.S.C. 641 (theft and receipt of property of the United States): Knowledge that property knowingly converted belongs

The rationale for this rule is that the federal or interstate commerce nexus is logically no part of the crime itself, but is included in the statute merely as a ground for establishing or defining the extent of exercise of federal jurisdiction. The essence of the crimes lies in their other elements, *e.g.*, assault, robbery, theft, or knowing possession of stolen property. Nothing is added to the guilt of the defendant by reason of the fact that a victim happens to be a federal officer, or a bank federally insured, or a state line crossed. There is consequently no reason at all why guilt under the statute should turn upon *knowledge* of that element. If that element is in fact present, the requirements of federal jurisdiction are satisfied; no purpose of the statute is advanced by requiring, in addition, that the perpetrator know of its presence. Cf. *Blassingame* v. *United States*, 427 F. 2d 329, 330 (C.A. 2), certiorari denied, 402 U.S. 945.

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to the government is unnecessary. *United States* v. *Howey*, 427 F.2d 1017 (C.A. 9); *United States* v. *Boyd*, 446 F.2d 1267, 1274 (C.A. 5); cf. *Findley* v. *United States*, 362 F.2d 921 (C.A. 10).

18 U.S.C. 659 (possession or receipt of goods stolen from an interstate shipment): Knowledge that goods were stolen specifically from interstate shipment unnecessary. *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *United States* v. *Vilhotti*, 452 F. 2d 1186 (C.A. 2), certiorari denied, 406 U.S. 947.

18 U.S.C. 1952 (travel in or use of facilities of interstate commerce to facilitate an unlawful activity): Knowledge that interstate facilities were used is unnecessary. *United States* v. *Bash*, 258 F. Supp. 807 (N.D. Ind.), affirmed *sub nom. United States* v. *Miller*, 379 F.2d 483, 487 (C.A. 7), certiorari denied, 389 U.S. 930; *United States* v. *Roselli*, 432 F.2d 879 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F.2d 101 (C.A. 8), certiorari denied, 402 U.S. 952.

In *United States* v. *Crimmins*, *supra*, Judge Learned Hand proposed a different rule for conspiracies to violate substantive federal laws. Crimmins was charged with conspiring to transport stolen securities in interstate commerce, knowing them to be stolen (18 U.S.C. (1940 ed.) 415). Judge Hand accepted as a premise that an accused need not be shown to have known the stolen securities had been transported in interstate commerce in order to support a conviction under the substantive statute, but concluded that one could not be guilty of *conspiring* to transport such securities in interstate commerce unless he knew, or at least had reason to suppose, that the securities would be so transported. Judge Hand supported his conclusion with his now famous traffic light analogy (123 F. 2d at 273):

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light for one cannot agree to run past a light unless one supposes that there is a light to run past.

While it is superficially compelling, the analogy fails because it posits the core criminal conduct, in the place of the jurisdictional element, as the item with respect to which *mens rea* is required. Had the crime and the jurisdictional element been separated, the analogy would have supported just the opposite conclusion. Thus if one spoke of running past a red light on an Indian reservation, where it was planned to disobey the light, but the conspirators were in ignorance of the existence of the reservation, it would

seem clear that one could both commit and agree to commit the offense, without knowing that the light was located on a reservation.

Analogies aside, the *Crimmins* rule rests on two erroneous assumptions. It assumes that the jurisdictional element of a federal crime provides the basis for punishment, and it assumes that to violate federal law the terms of a conspiracy must include a specific agreement that federal, as opposed to state, law be violated. Neither assumption is well founded. As we have noted in respect to violations of substantive federal laws, the jurisdictional element is no part of the crime itself, but constitutes simply the constitutional predicate for imposition of the federal investigative, prosecutorial, and judicial apparatus upon particular areas of criminal activity. If knowledge of the jurisdictional element is not part of the substantive crime, there is no reason why it should be a necessary part of a conspiracy. As cogently put by the Ninth Circuit in rejecting the *Crimmins* rule (*United States* v. *Roselli*, *supra*, 432 F. 2d at 891–892):

> The essence of the offense under the general conspiracy statute, 18 U.S.C. § 371, is an agreement by two or more persons to commit the substantive crime. In virtually all cases the meeting of minds is established simply by inference from a concert of action that produces the forbidden result. There is no apparent reason for requiring not only proof of a concert of action that includes all elements of the substantive offense, but also proof of knowledge of the jurisdictional element that is not required for conviction of the substantive offense.

A second erroneous assumption in *Crimmins* is that because an illegal "agreement" is involved, every element encompassed by the scheme must be known to the participants, and that to exclude the jurisdictional element from the requirement of knowledge is to expand unjustly the scope of the agreement beyond its terms (123 F. 2d at 273):

> It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. [Citations omitted.] And this is equally true, when the crime which the conspirators have agreed upon, is one of which they severally might be guilty though they were ignorant of the existence of some of its constituent facts. * * *

But if two or more persons may be joint principals in the commission of a federal substantive offense without knowledge of a jurisdictional element (see App. B, *infra*, pp. 29–32), it is not an expansion of their original design to charge them with conspiracy to commit that offense.

The argument that an expansion of the conspiracy is involved seem to be based upon the mistaken belief that the individual conspirator must entertain knowledge of each and every detail of the illicit agreement. Yet this notion is contrary to prevailing judicial views as to the nature of conspiracy. Indeed, as this Court noted in *Blumenthal* v. *United States*, 332 U.S. 539, 557, conviction for conspiracy may rest solely upon a showing of understanding of the general plan

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"* * * without requiring evidence of knowledge of all its details or of the participation of others." Similarly, the individual conspirator is held responsible for all the acts of his co-conspirators performed in the furtherance of the agreement, whether or not the conspirator knows of their having been performed. See *Pinkerton* v. *United States,* 328 U.S. 640, 647.

The fundamental function of the law of conspiracy is to impose sanctions against persons who agree with one another to perform acts which, if performed, would constitute violations of the criminal laws. Respondent and his co-conspirators were found by the jury to have agreed to steal money from, and if necessary assault, certain individuals. When they attempted to carry out this agreement, they committed an unlawful assault upon federal officers punishable under 18 U.S.C. 111. The actions constituting this offense were the precise ones agreed upon by the conspirators. To hold that they may not be punished for violation of the federal conspiracy law on the grounds relied upon below thus wholly distorts the nature and function of that prohibition.

3. Although doing so "somewhat reluctantly" (App. A, *infra,* p. 24), the court below accepted *Crimmins* as "controlling precedent." Moreover, the Second Circuit has made it clear in a series of *sua sponte* applications of the *Crimmins* rule that it intends to apply the rule to all federal criminal conspiracies (see App. A, *infra,* p. 24; *United States* v. *Houle and Diodato,* C.A. 2, No. 72–1492, decided December 27, 1973; *United States* v. *De Marco,* C.A. 2, No. 73–1768, decided December 12, 1973; *United States* v. *Vilhotti,* 452 F. 2d

1186 (C.A. 2), certiorari denied, 406 U.S. 947). This has been done despite cogent criticism of the rule. See, *e.g., Developments in the Law, Criminal Conspiracy,* 72 Harv. L. Rev. 920, 938–940 (1959). The *Final Report of the National Commission on Reform of Federal Criminal Laws* (1971) has explicitly disavowed the notion that a conspirator must have knowledge of the jurisdictional element. See Sections 203, 204, and 1004 of the *Final Report.* However, enactment of a new federal criminal code is at least five years away. In the meantime the *Crimmins* rule imposes a serious and unwarranted burden on federal conspiracy prosecutions.

It is true that most federal conspiracy charges are joined with substantive charges, and it is common that, if convictions are procured on both counts, the sentence imposed on the conspiracy count is concurrent with that on the substantive count (although this did not happen in respondent's case). But this should not obscure recognition of the fact that the issue presented is of considerable practical importance to the administration of criminal justice. Most obviously, the *Crimmins* rule interposes substantial obstacles in the way of prosecution of unconsummated conspiracies, where the substantive offense may have been blocked by alert law enforcement. Similarly, in cases involving a jurisdictional amount (*e.g.,* 18 U.S.C. 2314 and 2315, prohibiting transportation or receipt of stolen goods of the value of $5,000 or more), there may be clear proof of a conspiratorial plan of sufficient scope to meet the statutory minimum, yet it may not be possible to prove the transportation or receipt of specific

items amounting in value to more than the requisite amount. The ability to prosecute for the conspiracy also has an important bearing on questions of venue, joinder, evidentiary rulings, and other facets of the law enforcement process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 997, 998, 999—September Term, 1972.

(Argued June 22, 1973 Decided July 13, 1973.)

Docket Nos. 73-1297, 73-1466, 73-1467

UNITED STATES OF AMERICA,

Appellee,

—against—

ENRIQUITO ALSONDO, RALPH FEOLA and HENRY ROSA,

Defendants-Appellants.

Before:

FRIENDLY, FEINBERG and MANSFIELD,

Circuit Judges.

Appeals from judgments of conviction after jury trial in the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *J.*, of assault against federal agents engaged in performance of official duties, in violation of 18 U.S.C. § 111, of conspiracy to violate that provision, and, as to one defendant, of carrying a deadly weapon during commission of a felony, in violation of 18 U.S.C. § 924(c)(2).

Conspiracy convictions reversed. Substantive assault convictions reversed and remanded as to Rosa, reversed with instructions to dismiss as to Feola, and affirmed as to Alsondo.

GEORGE J. BELLANTONI, White Plains, N.Y., *for Appellant Feola.*

SELIG LENEFSKY, New York, N.Y., *for Appellant Alsondo.*

JOSEPH I. STONE, New York, N.Y., *for Appellant Rosa.*

PAUL H. SILVERMAN, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York; Richard J. Davis, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

After a jury trial in the United States District Court for the Southern District of New York before Charles L. Brieant, Jr., *J.*, appellants Enriquito Alsondo, Henry Rosa and Ralph Feola were convicted on charges that they had assaulted federal narcotics agents, while the latter were engaged in performance of official duties, in violation of 18 U.S.C. § 111, and that they had conspired to violate that provision, 18 U.S.C. § 371. Alsondo was also convicted on a third count charging the unlawful carrying of a deadly weapon during commission of a felony, in violation of 18 U.S.C. § 924(c)(2).[1] For reasons which follow, we reverse

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1 Alsondo was sentenced to three years on the substantive assault count (count two), and to eight years on the deadly-weapon count (count three), to run concurrently with each other and, according to Judge Brieant's recommendation, with Alsondo's present confinement under a state sentence; imposition of sentence on the conspiracy count (count one) was suspended, but Alsondo was given five years on probation, to commence upon expiration of his sentences on the other counts. Rosa was sentenced to concurrent three-year terms on counts one and two. Feola was sentenced on count one to four years, and on count two to three years on probation consecutive with his imprisonment, coupled with a $3,000 fine.

all convictions under the conspiracy count and dismiss that charge; we reverse the substantive assault conviction of Feola and direct that the indictment as to him be dismissed; we reverse the substantive assault conviction of Rosa and remand as to him; we affirm the convictions against Alsondo on the two substantive counts against him.

The facts may be stated briefly. On August 21, 1971, Agent Hall, while working in an undercover capacity, met Michael Farr[2] through an informer, at which time Farr promised to sell Hall a kilo of heroin supplied through appellant Ralph Feola. Ten days later, and accompanied by appellant Rosa, Farr met Hall and the informer, now joined by Agent Lightcap also acting in an undercover capacity. The five proceeded to an apartment on West 68 Street in Manhattan, where the agents were to purchase a half kilo of heroin for $17,000; Agent Hall had a "flash-roll" of cash with him, which he showed Rosa. When the group arrived at the apartment, Alsondo let them in. Agent Lightcap was given custody of the money and remained in the living room while Alsondo, Rosa and Farr ushered Hall and the informer into the bedroom. Alsondo pointed to packages of white powder, which he identified as the narcotics. (Upon subsequent testing, the substance proved to be powdered sugar.)

In rapid succession, Farr and Rosa left the bedroom; the informer requested a scale to "test" the substance the agents believed to be heroin; Alsondo left the bedroom, and Agent Hall, after opening a closet door and discovering a man bound and gagged,[3] followed Alsondo. Walking into

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2 Co-defendant Farr was indicted, tried with the three appellants, and convicted on counts one and two. He was sentenced at a later date under the provisions of the Youth Corrections Act, 18 U.S.C. § 5005 et seq. His appeal is pending, but as yet unargued.

3 The man was later identified as Nilo Tanderone, the lessor of the apartment.

the hallway, Agent Hall saw Agent Lightcap at the opposite end, facing Hall; Alsondo stood between them, facing Lightcap. Hall saw Alsondo reach behind his back and begin to pull a revolver from his waistband. Hall shouted a warning to Lightcap and identified the pair as federal agents; the two then subdued Alsondo after a scuffle and handcuffed him. Agent Lightcap thereupon walked into the living room and saw Rosa, who rushed toward him and shoved him in an apparent attempt to flee. Rosa was apprehended as was Farr, who had remained in the kitchen. Upon subsequent inspection of the premises, appellant Feola was discovered hiding in a closet and was arrested. At the time of arrest, Feola possessed a small telephone book containing the phone numbers of the West 68 Street apartment, of Farr and of Alsondo.[4]

The conspiracy count was submitted to the jury on the theory that an unlawful agreement among the four co-defendants could be inferred from the acts committed and circumstances as described above: The Government argued that the four had agreed to bilk the agents by fraudulently selling them sugar for $17,000 and had further agreed (or had foreseen the probable need) to rob the agents at gunpoint should the victims discover the swindle and attempt to thwart it. The district judge instructed the jury that proof of specific knowledge of the official identity of the assault victims was not required to establish a conspiracy to violate 18 U.S.C. § 111. He said:

> [I]t is not necessary for the government to prove that the defendants or any of them knew that the persons

4 Later, while in custody, Feola made allegedly false exculpatory statements to an agent and to an Assistant United States Attorney. He argues that the statements should have been suppressed under *Miranda*, but, in view of our disposition, we need not consider the question. Nor need we decide whether the district judge abused his discretion in denying a severance to appellant Rosa.

> they were going to assault or impede or resist were federal agents. It's enough, as far as this particular element of the case is concerned, for the government to prove that the defendants agreed and conspired to commit an assault.

In so instructing the jury, the district judge appears to have relied on a line of cases beginning with *United States* v. *Lombardozzi*, 335 F.2d 414, 416 (2d Cir.), cert. denied, 379 U.S. 914 (1964), which hold that such knowledge or scienter is not a necessary element of the *substantive offense* under section 111. See, e.g., *United States* v. *Ulan*, 421 F.2d 787, 788 (2d Cir. 1970); *United States* v. *Montanaro*, 362 F.2d 527 (2d Cir.) (per curiam), cert. denied, 385 U.S. 920 (1966).[5]

The question remains, however, whether proof of such scienter is nevertheless necessary to convict of *conspiring* to violate section 111. In *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941), we held that while knowledge that stolen securities had passed through interstate commerce was not a required element of the substantive offense under the statute there involved, such knowledge was a necessary element of proof of the crime of conspiring to cause stolen securities to be transported in interstate commerce. In a much-quoted passage, Judge Learned Hand stated:

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light,

5 In analogous situations, we have held that specific knowledge of factual elements that confer federal criminal jurisdiction is not required for conviction of various substantive offenses. For example, as to knowledge of interstate transportation of stolen property, see, e.g., *United States* v. *Tannuzzo*, 174 F.2d 177, 180 (2d Cir.), cert. denied, 338 U.S. 815 (1949); as to knowledge of the federal capacity of officials to whom a bribe is proffered in violation of 18 U.S.C. § 201(b)(1), see *United States* v. *Jennings*, 471 F.2d 1310, 1312 (2d Cir.), cert. denied, 41 U.S.L.W. 3554 (U.S. Apr. 16, 1973).

> for one cannot agree to run past a light unless one supposes that there is a light to run past.

123 F.2d at 273. See also *United States* v. *Sherman,* 171 F.2d 619, 624 (2d Cir. 1948), cert. denied, 337 U.S. 931 (1949). We have frequently reaffirmed this distinction. E.g., *United States* v. *Vilhotti,* 452 F.2d 1186, 1189 (2d Cir. 1971), cert. denied, 406 U.S. 947 (1972) (conspiracy to buy, receive or possess chattels stolen from interstate commerce); *United States* v. *Jacobs,* 475 F.2d 270, 282 (2d Cir. 1973), petition for cert. filed, 41 U.S.L.W. 3596 (U.S. Apr. 30, 1973) (No. 72-1469) (conspiracy to deal in stolen securities which have moved or are to move interstate).

The *Crimmins* rationale has been criticized,[6] and it has been pointed out that if the federal interest involved in such statutes—e.g., the use of the mails, interstate transportation—were viewed "not as an element of the respective crimes but frankly as a basis for establishing federal jurisdiction," [7] then much of the problem before us would disappear. However, although the National Commission on Reform of Federal Criminal Laws has proposed this change,[8] Congress has not yet acted upon it. Absent legislative change, the recognition that specific knowledge of factual circumstances conferring federal jurisdiction is unnecessary to proof of the substantive offense under such statutes but is required for proof of conspiracy remains very much the law in this circuit and, apparently, elsewhere as well.[9]

On this view, the conspiracy convictions before us cannot stand. It is true that we have found no case squarely raising the question whether scienter is required to convict for conspiring to violate 18 U.S.C. § 111. This is not surprising; most people—even those not inclined to be law-abiding—would not agree to assault a federal officer except perhaps as incident to another, more serious crime. But the dearth of direct authority only emphasizes the great number of analogous cases already cited.[10] As applied to the crimes before us, *Crimmins* and its progeny mandate the view that specific knowledge of the official federal capacity of assault victims must be proved to establish conspiracy to violate section 111, though such proof is unnecessary to convict for the substantive offense. It might be possible to distinguish the *Crimmins* line of authority on the ground that the interest of the federal government in protecting its

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6 Developments in the Law—Criminal Conspiracy 72 Harv. L. Rev. 920, 938-39 (1959); I Nat'l Comm'n on Reform of Federal Criminal Laws, Working Papers 389 (1970).

7 ALI, Model Penal Code § 5.03, Comment, at 112 (Tent. Draft No. 10, 1960).

> No difficulty would in that event arise when the mails were actually used or a state line crossed in fact, whether or not this was within the contemplation of the parties; nor would there be a difficulty when this circumstance is planned, whether or not it actually has occurred. In situations where the jurisdictional circumstance neither exists nor was in contemplation of the parties, it would be clear that jurisdiction simply cannot be affirmed.

Id.

8 Final Report of the Nat'l Comm'n on Reform of Federal Criminal Laws, in Hearings before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 92d Cong., 1st Sess., pt. 1 (1971), at 224.

9 See cases cited in Model Penal Code § 5.03, Comment, at 111 n.55; *United States* v. *Barnes,* 383 F.2d 287, 290-93 (6th Cir. 1967), cert. denied, 389 U.S. 1040 (1968) (conspiracy to travel interstate or cause such travel to promote unlawful activity in violation of 18 U.S.C. § 1952); *Nassif* v. *United States,* 370 F.2d 147, 152 (8th Cir. 1966) (conspiracy to convert goods from interstate commerce); cf. *Pereira* v. *United States,* 347 U.S. 1, 12-13 (1954) (conspiracy, inter alia, to use mails to defraud). But see *United States* v. *Roselli,* 432 F.2d 879, 891-92 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971) (conspiracy to violate § 1952; scienter unnecessary).

10 See also *United States* v. *Hall,* 342 F.2d 849, 852 n.4 (4th Cir.), cert. denied, 382 U.S. 812 (1965), where the court strongly implied that scienter is a necessary element under 18 U.S.C. § 372, making it unlawful to "conspire to injure [any officer of the United States] in his person or property on account of his lawful discharge of the duties of his office."

officials against physical attack is so strong, cf. *Ladner* v. *United States*, 358 U.S. 169, 173-75 & n.3 (1958), that prosecutions under the general conspiracy statute may nonetheless be maintained even in the absence of specific anti-federal intent, at least when an assault has actually occurred. We do not believe, however, that the thrust of existing precedent can be so easily disregarded. Furthermore, requiring proof of scienter for a conspiracy to deal in stolen securities but not for a conspiracy to violate section 111 would create an anomaly: Federal prosecution of the former crime is made more difficult although the investigative resources of the federal system may be indispensable for coping with a large multi-jurisdiction conspiracy, cf. Developments in the Law—Criminal Conspiracy, supra note 6, at 938-39, while federal prosecution of the latter conspiracy is facilitated, although it is an offense likely to be localized and more amenable to control through state law enforcement systems.

Accepting the controlling precedents somewhat reluctantly, we must conclude that the instruction to the jury on the conspiracy count was erroneous. Although no exception was taken to the charge—indeed, no mention of the issue is made in the briefs submitted to us, nor was the question pursued at oral argument until we raised it from the bench[11]—we nonetheless believe that the charge constituted "plain error," Fed. R. Crim. P. 52(b), which we should notice sua sponte. Where there is a failure to charge an essential element of the offense, the error almost invariably affects "substantial rights" within the meaning of the rule. See *United States* v. *Fields*, 466 F.2d 119, 121

11 We observe, in passing, that although the point was squarely posed from the bench, we have received no request from the Government to submit a supplemental brief, nor have we been favored with any correspondence directing us to any authority contrary to the result we reach.

(2d Cir. 1972); *United States* v. *Massiah*, 307 F.2d 62, 70-71 (2d Cir. 1962) (Hays, *J.*, concurring), rev'd on other grounds, 377 U.S. 201 (1964). And we note that improper jury charges under section 111 (particularly relating to elements of scienter) have been a fertile source for judicial willingness to invoke the "plain error" rule. E.g., *United States* v. *McKenzie*, 409 F.2d 983, 985-86 (2d Cir. 1969) (dictum); see *United States* v. *Young*, 464 F.2d 160, 164 (5th Cir. 1972); cf. *United States* v. *Rybicki*, 403 F.2d 599, 602 (6th Cir. 1968) (indictment charged obstruction, by threat of force, of IRS agents engaged in performance of their duties in violation of 26 U.S.C. § 7212(a)). Moreover, appellants do argue on appeal that the evidence of conspiracy was insufficient as a matter of law. While their focus is more general, it is quite clear from an examination of the record that the evidence was insufficient on the issue of scienter and that directed judgments of acquittal should have been granted when motions for that relief were timely made. Certainly, the necessary scienter could not be properly imputed to the alleged conspirators on the ground that they could reasonably have anticipated that the victims of their planned assault might be federal agents. Compare *United States* v. *Corallo*, 413 F.2d 1306, 1326-27 (2d Cir.), cert. denied, 396 U.S. 958 (1969) (conspirator knew that the likelihood of use of interstate phone calls was great); *Nassif* v. *United States*, supra note 9, at 153 (knowledge of interstate origin may be implied from proof of conspiracy so broad that conspirators were indifferent to the source of the goods). To the contrary, it is altogether unlikely that would-be swindlers would knowingly select federal officers as the targets of their fraudulent scheme or would knowingly assume even the most remote risk of such occurrence.

Having concluded that no conspiracy prosecution can be maintained on the facts of this case, we turn to the sub-

stantive convictions. Relying on *Pinkerton* v. *United States*, 328 U.S. 640 (1946), the trial judge submitted the substantive assault charge against Feola to the jury solely on the theory that while he committed no act of force himself—having been in a closet throughout the events in question—if he had nevertheless joined with Alsondo and the others in an unlawful conspiracy, then as a co-conspirator he might be held responsible for criminal acts committed in furtherance of the unlawful agreement. Id. at 647. Since the judge evidently and, we think, rightly believed that this was the only basis upon which the jury could properly convict Feola of the substantive offense, his conviction must be reversed and the charge dismissed where the predicate conspiracy conviction cannot stand.

Likewise, the substantive conviction against Rosa must be reversed. The district judge submitted this count to the jury on two alternative bases. The first authorized the jury to convict Rosa

> based on his own actions, if you find that he raised his hand against the agent . . . and moved toward the door and did so wilfully and intentionally with the purpose of resisting arrest or assaulting the officer or in any way impeding or interfering with his duties.

There was sufficient evidence, if believed, to establish commission of an assault or an otherwise prohibited act by Rosa. Lightcap identified himself to Rosa as a federal agent, thus foreclosing any contention of even momentarily lawful resistance, cf. *United States* v. *Heliczer*, 373 F.2d 241, 248-49 (2d Cir.), cert. denied, 388 U.S. 917 (1967), or at least permitting the jury to find otherwise. Rosa thereafter lifted his hand menacingly, as though to shove Lightcap, and did in fact shove him—both acts sufficient to constitute a crime under section 111. See, e.g., *United States* v. *Bamberger*, 452 F.2d 696, 699 (2d Cir. 1971),

cert. denied, 405 U.S. 1043 (1972). Nevertheless, our reversal turns on the judge's alternative instruction, again grounded on *Pinkerton*, supra, which permitted the jury to convict Rosa of the substantive crime

> by reason of the actions of Alsondo, if you find that Alsondo assaulted the federal officers or either of them in furtherance of the conspiracy, . . . and while Rosa was a member of the conspiracy. . . .

Since we have no way to determine on which theory the jury did in fact convict, we must reverse the conviction on this count. See *Mills* v. *United States*, 164 U.S. 644, 649 (1897); *Nicola* v. *United States*, 72 F.2d 780, 787 (3d Cir. 1934). As the evidence was sufficient to convict on the assault count even in the absence of the erroneous instruction, however, we do not order dismissal but remand for a new trial.

Alsondo's conviction on the substantive assault count stands in a wholly different posture. There is no good reason to believe that his conviction was tainted by any erroneous alternative instruction, for none was given.[12] His contention that, in other respects, the evidence was insufficient to permit the jury to find guilt beyond a reasonable doubt is wholly unpersuasive. Alsondo challenges the testimony that he had attempted to draw his revolver on Agent Lightcap in the hallway, but this was a question of credibility for the jury. He further argues that Agent Lightcap, facing appellant in the hallway, was never put in fear of battery by any act of Alsondo's. However, Agent Hall testified that he had shouted a warning to his colleague, and Lightcap testified that he was placed in fear

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12 The judge charged that:

> Insofar as concerns Alsondo, he may be found guilty on the substantive count, Count Two, if it is shown that he assaulted a federal agent, either Lightcap or Hall.

of bodily harm as a result of the warning. In any event, the jury could infer that from his own observations, Lightcap had perceived Alsondo's acts as constituting an immediate threat of physical injury.[13]

The conspiracy convictions are reversed and the conspiracy count is dismissed as to all appellants; the substantive assault conviction of Feola is reversed and the count is dismissed as to him; the assault conviction of Rosa is reversed and remanded for further proceedings consistent with this opinion; the conviction of Alsondo on two substantive counts is affirmed.

13 With respect to count three—charging possession of a deadly weapon during commission of a felony—Alsondo argues that since "the gun possession is not a federal offense, the third count cannot stand alone." Since Alsondo's conviction on the principal substantive count is affirmed, the argument is without merit, and we affirm his conviction on the third count.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 997, 998, 999—September Term, 1972.

(Decided November 19, 1973.)

Docket Nos. 73-1297, 73-1466, 73-1467

UNITED STATES OF AMERICA,

Appellee,

—against—

ENRIQUITO ALSONDO, RALPH FEOLA and HENRY ROSA,

Defendants-Appellants.

Before:

FRIENDLY, FEINBERG and MANSFIELD,

Circuit Judges.

ON PETITION FOR REHEARING

PAUL J. CURRAN, United States Attorney for the Southern District of New York; Jed S. Rakoff, John D. Gordan III and John W. Nields, Jr., Assistant United States Attorneys, *for Appellee.*

GEORGE J. BELLANTONI, White Plains, N.Y., *for Defendant-Appellant Feola.*

JOSEPH I. STONE, New York, N.Y., *for Defendant-Appellant Rosa.*

FEINBERG, *Circuit Judge:*

On July 13 of this year, we reversed in part a judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *J.*, convicting Enriquito Alsondo, Ralph Feola and Henry Rosa of assault on federal narcotics agents, in violation of 18 U.S.C. § 111, and conspiracy to violate that provision, 18 U.S.C. § 371.[1] At issue now is our disposition of the cases of Feola and Rosa. With respect to the conspiracy convictions, we reversed and dismissed the count. Regarding the substantive assault convictions, we also reversed; we dismissed as to Feola, but remanded Rosa's case for a new trial.[2] Our prior opinion sets forth the underlying facts.

The Government has sought a rehearing of the reversal of the assault convictions of Feola and Rosa. (The Government does not at this time challenge the doctrine of *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941), under which we dismissed the conspiracy counts; that part of the judgment therefore stands.) We asked for, and received, briefs from both sides on the issues. For reasons stated below, we grant the petition for rehearing and affirm Feola's and Rosa's convictions of assault against federal agents.

In our prior opinion, we assumed that reversal of the conspiracy convictions for failure to prove knowledge of the intended victims' official character necessarily vitiated the substantive assault convictions since a *Pinkerton* charge

1 Alsondo was also convicted under 18 U.S.C. § 924(c)(2) of unlawfully carrying a deadly weapon during the commission of a felony.

2 Alsondo's conspiracy conviction was likewise reversed and the charge dismissed; his convictions on the substantive counts were, however, affirmed.

had been given.[3] Upon the further reflection induced by the Government's petition, however, we believe that this conclusion was not justified on the facts of this case. It is well established in this and in other circuits that the admissibility of acts of a joint criminal venturer against his partner in crime "rests on basic principles of agency and not on the presence of a conspiracy count."[4] *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966) (Friendly, *J.*), cert. denied, 386 U.S. 1019 (1967). Similarly, the out-of-court declarations of a co-conspirator are admissible against a defendant where joint venture is shown by the evidence, although conspiracy is not alleged in the indictment. *United States* v. *Annunziato*, 293 F.2d 373, 378-81 (2d Cir.), cert. denied, 368 U.S. 919 (1961); *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945). Cf. *United States* v. *Jacobs*, 475 F.2d 270, 281 n.25 (2d Cir. 1973).

At various points in the charge, the lower court referred to a conspiracy to assault a federal agent or to violate 18 U.S.C. § 111, as well as to a conspiracy to obtain the buyers' money by fraud or force.[5] Therefore,

3 *Pinkerton* v. *United States*, 328 U.S. 640 (1946), held that a conspirator was liable for the reasonably foreseeable crimes committed by a co-conspirator in furtherance of and during the venture.

4 See, e.g., *Davis* v. *United States*, 409 F.2d 1095, 1100 (5th Cir. 1969); *United States* v. *Messina*, 388 F.2d 393, 394-95 (2d Cir.), cert. denied, 390 U.S. 1026 (1968); *United States* v. *Jones*, 374 F.2d 414, 418 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *United States* v. *Smith*, 343 F.2d 847, 849 (6th Cir.), cert. denied, 382 U.S. 824 (1965).

5 Whereas the former theory is untenable in light of *Crimmins*, the latter is clearly viable. This juxtaposition of correct and erroneous instructions does not necessitate reversal since, on any sensible view of the matter, the jury on these facts could not have found a conspiracy to assault a federal officer without in addition finding a conspiracy simply to assault or to get the money by fraud or force. *United States* v. *Jacobs*, 475 F.2d 270, 282-84 (2d Cir. 1973).

on these facts the jury's finding against defendants on the conspiracy count has a controlling effect on the substantive counts of assaulting a federal officer. With regard to the latter, the jury must already have found an agreement—involving Feola—to assault a victim (who turned out to be a federal officer) or to take money from him by fraud or force. In the absence of such a finding, the jury could not have convicted Feola since both the evidence and the charge pointed to Alsondo and Rosa as the only possible assailants. Rosa's case parallels Feola's except that the jury could, pursuant to the charge, have found the former personally rather than vicariously guilty of assaulting a federal agent.[6] This finding of criminal agreement is sufficient, on general agency principles, to sustain defendants' liability for their co-conspirators' actions. Under *Pinkerton*, supra, there are circumstances where a co-conspirator may be held liable as part of a conspiracy of indefinite scope and duration for a specific crime which he should have foreseen but perhaps did not. This is not such a case. The jury's finding makes clear that Feola and Rosa were part of a plot to commit the crime that actually occurred. On such facts, the finding of guilt as to each should stand.[7]

We therefore grant the Government's petition for a rehearing and affirm the assault convictions of Feola and Rosa. The judgment is modified in accordance with this opinion.[8]

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6 The record supports a conviction of Rosa as principal, if this in fact occurred.

7 P. Johnson, The Unnecessary Crime of Conspiracy, 61 Calif. L. Rev. 1137, 1146 (1973).

8 We have also considered the remaining arguments raised by defendants Feola and Rosa in their original briefs and find no reason why the assault convictions should not be affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 73-1297—73-1466-7

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of November, one thousand nine hundred and seventy-three.

Present: Hon. HENRY J. FRIENDLY, Hon. WILFRED FEINBERG, Hon. WALTER R. MANSFIELD, *Circuit Judges.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

—against—

ENRIQUITO ALSONDO, MICHAEL FARR, RALPH FEOLA, HENRY ROSA, *Defendants-Appellants.*

A petition for rehearing having been granted, additional briefs having been filed and reconsideration having been given without further oral argument,

Upon consideration thereof, it is

Ordered that the judgment of this Court of July 13, 1973 be and it hereby is modified in accordance with the opinion of this Court of November 19, 1973.

A. DANIEL FUSARO,
Clerk.

U.S. GOVERNMENT PRINTING OFFICE : 1974 O - 530-510

Supreme Court, U. S.
FILED
JUL 1 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1123

UNITED STATES OF AMERICA,
Petitioner,

—v.—

RALPH FEOLA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 18, 1974
CERTIORARI GRANTED APRIL 15, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1123

UNITED STATES OF AMERICA,

Petitioner,

—v.—

RALPH FEOLA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RELEVANT DOCKET ENTRIES

12-27-72 Filed Indictment

* * * *

1- 2-73—Jury trial begun before BRIANT, J.

* * * *

1- 8-73—Trial continued and concluded. All defendants found guilty as charged.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Cr. 1372

[Filed Dec. 27, 1972, U.S. District Court, S. D. of N. Y.]

UNITED STATES OF AMERICA

v.

ENRIQUITO ALSONDO, MICHAEL FARR, RALPH FEOLA, and HENRY ROSA, DEFENDANTS

INDICTMENT

The Grand Jury charges:

1. From on or about the 1st day of August, 1972, up to and including the date of the filing of this indictment, in the Southern District of New York, ENRIQUITO ALSONDO, MICHAEL FARR, RALPH FEOLA, and HENRY ROSA, the defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly, combined, conspired, confederated and agreed together and with each other to violate Section 111 of Title 18, United States Code.

2. It was a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would forcibly assault, resist, oppose, impede, intimidate and interfere with agents of the Bureau of Narcotics and Dangerous Drugs, persons designated in Section 1114 of Title 18, United States Code, while they were engaged in and on account of the performance of their official duties.

OVERT ACTS

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about August 31, 1972, defendants FARR and ROSA entered a vehicle in the vicinity of 50th Street and Second Avenue, New York, New York.

2. On or about August 31, 1972, defendants FARR and ROSA entered Apartment 405, 155 West 68th Street, New York, New York where defendants ALSONDO and FEOLA were waiting.

3. On or about August 31, 1972, defendant ALSONDO drew a Pietro Beretta handgun.

(Title 18, United States Code, Section 371.)

SECOND COUNT

The Grand Jury further charges:

On or about the 31st day of August, 1972, in the Southern District of New York, ENRIQUITO ALSONDO, MICHAEL FARR, RALPH FEOLA, and HENRY ROSA, the defendants, did unlawfully, wilfully and knowingly forcibly assault, resist, oppose, impede, intimidate and interfere with agents of the Bureau of Narcotics and Dangerous Drugs, persons designated in Section 1114 of Title 18, United States Code, while they were engaged in and on account of the performance of their official duties, and during the commission thereof defendant ALSONDO did use a deadly weapon, to wit a Pietro Beretta handgun.

(Title 18, United States Code, Sections 2, 111 and 1114.)

THIRD COUNT

The Grand Jury further charges:

On or about the 31st day of August, 1972, in the Southern District of New York, ENRIQUITO ALSONDO, the defendant, did unlawfully, wilfully and knowingly carry a firearm, to wit, a Pietro Beretta handgun, during the commission of the felonies charged in the First and Second Counts of this Indictment.

(Title 18, United States Code, Section 924(c)(2).)

/s/ Whitney North Seymour, Jr.
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SELECTIONS FOR THE TRIAL TRANSCRIPT

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DIRECT EXAMINATION OF JEFFREY R. HALL

[17] BY MR. ROHRER:

Q Mr. Hall, by whom are you employed?
A I am a special agent, U. S. Department of Justice, Bureau of Narcotics and Dangerous Drugs.
Q How long have you been an agent?
A Approximately five years.
Q And you were an agent in August and September of 1972, is that correct?
A Yes, sir.
Q Do you know a person named Michael Farr?
A Yes, I do.
Q Do you see him in the courtroom?
[18] MR. KRIEGER: I concede, your Honor. Mr. Farr is seated in back of me.
THE COURT: All right, it is conceded the witness knows him.
MR. ROHRER: And did identify him in court.
THE COURT: Is that the concession?
MR. KRIEGER: Yes.
Q When did you first meet Michael Farr?
A I first met him on August 21 of this year—of 1972, excuse me.
Q We will all be confused with that I am sure, for a few days.
Where did you meet him?
A I met him at an apartment on Second Avenue and 50th Street in New York City.
Q Was anyone with you?
A Yes, sir.
Q Who was that?
A I was introduced to him by an informant.
Q What happened when you met him?
A I had a conversation with him regarding a drug transaction.

Q Can you tell us in as much detail as you can recall what he said to you and what you said to him during that [19] conversation?
A Yes.
MR. STONE: Your Honor, would you give the jury a precautionary instruction as to the hearsay aspect at the present time?
THE COURT: Yes, this testimony at the present time is being received only with respect to such person as you may find present at the time of the conversation. It's possible that later on, depending on how the proof develops, that the government may be able to connect this testimony with one or more of the other defendants. I will instruct you in detail with respect to a conspiracy charge as to when and under what conditions and for what purpose you may accept evidence of the statements or actions of one person whom you may consider to be a conspirator as the statements or actions of another such person.
Q Agent Hall, do you have the question in mind or would you like to have it read back?
A No, I remember the question.
Q Okay.
A I was introduced to Farr as a man interested in purchasing large quantities of heroin. And I discussed the transaction with him. I told him I was interested in buying a kilo of heroin, and he said that he could supply a kilo [20] for thirty thousand dollars. He told me that his connection was an Italian named Ralph Feola, who lived in White Plains, New York. And he also told me some other things about Mr. Feola.
MR. KRIEGER: I move to strike that last.
MR. BELLANTONI: Yes.
THE COURT: Yes, I will strike it out.
Q Was anything else said at this discussion that you can recall?
A Yes. There was other things said at the discussion.
Q How was it left after this first meeting with Michael Farr?
MR. KRIEGER: Objected to. That calls for a conclusion, your Honor.

THE COURT: Yes, it does, it is objectionable as to form, Mr. Rohrer.

Q Did you meet Michael Farr again?

A Yes, I did.

Q When was the second time you met him?

A The second time I met with him was on August 31, 1972.

Q Where did that meeting take place?

A I met him in front of the same apartment, 50th Street and Second Avenue, in Manhattan.

[21] Q Now, was any one with you when you went to meet him?

A Yes, sir.

Q Who was that?

A Agent Lightcap.

Q Anyone else?

A There were agents conducting surveillance at that meeting.

Q Was the informant there?

A Yes, sir, the informant was also there.

Q Was anyone with Mr. Farr?

A Yes.

Q Who?

A A man introduced to me as Henry, who I later identified as Henry Rosa.

Q Do you see Henry Rosa in the courtroom?

A Yes, I do.

Q Would you point him out?

MR. STONE: It's stipulated he has identified the defendant Rosa.

THE COURT: Well, that's very well and good. I sometimes think it's better for the witness to make the identification.

Q Do you see him here, Agent Hall?

A Yes, I do.

[22] Q Would you point him out?

A He is sitting at the table with the blue tie and gray suit on.

Q Now, what happened at this meeting?

A Mr. Rosa and Mr. Farr were standing in front of the apartment when we arrived, and we got out of our

car, and we joined them in Mr. Farr's car, which was a 1972 Chevrolet. Agent Lightcap and myself got in the back seat and Farr and Rosa got in the front seat of the car. They told us—

Q Try and specify who told you what, rather than they told us, if you can recall.

A Well, Farr introduced Rosa to us as Mr. Henry or Henry, and Rosa told us that they had a half-kilo of pure heroin to sell us, and that the price would be seventeen thousand dollars, and asked to see the money, and I did have a seventeen thousand dollar flashroll in my possession, in a brown paper bag, which I opened up and showed to him.

Q Before you go any further, will you tell us what a flashroll is?

A Yes, a flashroll is government, official government money that we have, and that we use when we are going to make a purchase, not to spend, but just to show so that the person thinks that we have the money. And thinks that we are going to spend the money.

[23] Q I'm sorry I interrupted you. After you showed him this flashroll, what happened then?

A Yes, then, Rosa said that the transaction would take place over at an apartment on the West Side, and said that we should drive over right then in this car, and I told him, well, we had our own car and we would follow, we would follow them over. Then, Rosa said, well, I'll go get in your car with you, and I'll direct you over to the apartment.

So, Rosa, Agent Lightcap and myself went and got in the car that we drove there, which is a government car, but an unmarked car, and the informant also got in the car with us, and then Rosa directed us to 155 West 68th Street in Manhattan.

Q Did Farr go any place after your meeting with him?

A Yes, Farr followed us. I believe he followed us in his car.

Q Now, what happened when you got to 155 West 68th Street?

A Rosa told us to drive into the garage, which is underneath the building, which we do, and then Farr followed us into the garage.

Q On the way over, did Rosa say anything to you?

A Yes, he did. I asked Rosa again, I asked him if the heroin was pure, and he said that—he called him the big man, [24] always sells pure heroin and he said that we were going to get to meet the big man, and he said he was mainly a body guard to make sure that nothing went wrong, to make sure that we had the money and that there were no guns involved.

MR. KRIEGER: May I respectfully request the Court to give the same precautionary instruction as heretofore with respect to this conversation on behalf of Farr?

THE COURT: I will take the testimony subject to connection as to anybody shown not to be present.

Q This was said in Farr's presence as you were driving there?

A No.

Q Getting back to your arrival at 155 West 68th, did Farr say anything to you there or Rosa say anything to you there after you arrived?

A Yes.

Q What did he say?

A Well, first of all, when we arrived, I had left my gun in the glove compartment, and I had no way to get the gun with Rosa in the car.

MR. KRIEGER: I object, non-responsive, your Honor.

THE COURT: I suppose it's non-responsive. You can frame a new question.

Q Let me put it this way. What happened when you got [25] there, and you can tell us the events.

THE COURT: You can ask him where the gun was, if you like.

A I had left my gun in the glove compartment, and I had no way of getting to it in front of Rosa, so after the attendant took possession of the car—

Q Was there a parking lot?

A It was an underground garage.

Q All right, go on.

A And I left the bag of money under the front seat, and when I got out of the car, Rosa said to me, you left the money under the front seat, I said I know, wait until the man parks the car, then I'll get the money. And the attendant parked the car, and I went to the car and got my gun out and I also got the money, and then I joined Agent Lightcap and Rosa and Farr and the informant, who were standing over near the pay window, where you pay at the garage.

Q Was anything said at that time?

A Yes. Farr told me that—he said you're going to be very satisfied and you're finally going to get to meet Ralph.

Q What happened next?

A Then, we went up, we climbed the stairs to the lobby of the apartment, and we took an elevator to the fourth floor and we went to room, I think it was 405.

[26] Q What happened when you got to the apartment?

A Rosa knocked on the door and, about a minute later, the door was opened by Alsondo.

Q Do you know the full name of Alsondo?

A Yes, Enriquito Alsondo.

Q Do you see him in the courtroom?

A Yes, I do.

Q Where is he?

A He just raised his hand. He is wearing a dark suit, red tie and sun glasses.

Q Standing right next to me?

A Yes.

THE COURT: Seated next to you.

MR. ROHRER: Excuse me, seated right next to me.

Q What happened?

A We all walked into the apartment, that is, Agent Lightcap, Rosa, Farr and the informant, and when we got into the apartment, Alsondo motioned into the room, as if to say, go into the room. And I asked Alsondo how many people were in the apartment, and he didn't respond to the question, he just said the stuff is in the bedroom. And I told him that I wasn't going to go into the bedroom, and he got irritated and the informant then

walked into the bedroom and came right back out and said everything is all right.

[27] Q Was there—did I interrupt you?

A Excuse me?

Q Had you finished your answer?

A Not quite, no.

Q Okay, excuse me. Sorry to interrupt.

A He came out and said everything was all right, that the drugs were in fact in the bedroom. Now, before the informant went into the bedroom, I heard Alsondo say, the old man is in the bedroom, and shortly after he said this, or while he was saying this, Rosa walked into the bedroom, then came right back out and asked Alsondo, where is the old man? And then this is when the informant went into the bedroom and came back out and said the stuff is there, everything is all right. At this point, I gave the bag containing the money to Agent Lightcap and I told him to stay out in the living room area, and then everybody walked into the bedroom, myself, Alsondo, Rosa, Farr and the informant, walked into the bedroom.

When I got into the bedroom, I saw on the bed a brown attache case which was opened and there were bags of white powder sitting in the attache case.

MR. ROHRER: May this be marked as Government's Exhibit 1 for identification, please.

(Government's Exhibit 1 marked for identification.)

[28] MR. ROHRER: And this box as Government's Exhibit 2 for identification.

(Government's Exhibit 2 marked for identification.)

Q I show you Government's Exhibit 1 for identification. Can you identify that, Agent Hall?

A Yes, sir I can.

Q What is it?

A This is the attache case that was sitting on the bed.

MR. ROHRER: The government offers Exhibit 1, your Honor.

THE COURT: Received in evidence.

(Government's Exhibit 1 received in evidence.)

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[31] BY MR. ROHRER:

Q Agent Hall, when Alsondo pointed out the packages to you in the brief case, which is in evidence as Government's Exhibit 1, where were Farr, Rosa and the informant?

A To the best of my knowledge, they were in the bedroom around the bed.

Q All right. After Alsondo indicated that this was the stuff, what happened?

A Well, I told him that everything looked okay, and when I said that, Rosa and Farr walked out of the bedroom.

Q Where did they go?

A I don't know. I just know that they walked out of the bedroom.

Q Was there one corridor leaving the bedroom?

A There is one corridor—walked out the bedroom leading into the hallway, a hallway which connects the rest of the house.

Q What about Alsondo.

A Alsondo stayed there for a few seconds. He stayed [32] there by the bed. When I said everything looks all right, and after about, after a few seconds, he also turned around and walked out of the bedroom.

Q What, if anything, did you do after he walked out of the bedroom?

A Well, before he actually got out of the bedroom, he was walking out of the bedroom, I opened up a closet door that was right near the bed, and I saw a man in the bedroom, in the closet. He was tied and gagged on the floor. And when I saw this, I realized that—

MR. KRIEGER: Objected to.

THE COURT: Yes, you can't testify as to what you realized, only what you saw or did, or what was done in your presence.

A Okay. When I saw the man tied and gagged, I drew my weapon and I came out of the bedroom and I was coming out of the bedroom, I saw Alsondo's back walking about mid-way—he was mid-way between the bedroom and the end of the hallway, and at the end of the hallway, was Agent Lightcap holding the brown paper bag.

Q Was Lightcap facing you?

A Yes, he was.

Q Facing Alsondo also?

A Yes.

[33] Q Where was Alsondo when you opened the closet door, on his way out of the bedroom?

A He was almost out of the bedroom, he had his back to me and was almost out of the bedroom.

Q What happened next?

A When I came out of the bedroom, Alsondo was reaching in the back—in his back, in his waistband at the middle of his back, and I saw him pulling a gun from his waistband. I yelled at Agent Lightcap that he had a gun. I came up behind him, I come up behind Alsondo, I had my gun drawn, I grabbed his arm, I yelled federal agents, and Agent Lightcap and I had to fight Alsondo, we got him down on the ground, I took the gun away from him, and Lightcap ran into the living room.

Q What kind of a top garment was Alsondo wearing, if any, a jacket, sweater, shirt?

A Wearing a sweater, a cardigan sweater, I believe.

MR. ROHRER: May this be marked as Government's Exhibit 3 for identification.

(Government's Exhibit 3 marked for identification.)

Q Agent Hall, I show you Government's Exhibit 3 for identification. Would you look at that and identify it, if you can, please?

A Yes, sir. This is the gun that Alsondo had.

[34] Q How can you tell that?

A I have my initials on it. I have my initials on here.

Q On the butt?

A Yes.

MR. ROHRER: Government offers Exhibit 3, your Honor.

MR. LENEFSKY: Objected to on behalf of Alsondo as irrelevant, incompetent, immaterial and not connected with the commission of a crime.

MR. KRIEGER: Objected to on behalf of the defendant Farr. No causal relationship whatsoever.

MR. STONE: I will join in objecting on behalf of the defendant Rosa. There is no proof in this case that Rosa knew Alsondo had a gun.

MR. BELLANTONI: I join in that objection. In fact, he hasn't been connected at all at this point.

THE COURT: I will overrule the objection of behalf of defendant Alsondo.

As to the other defendants, it will be received subject to connection and you will have a reserved motion to strike it at the end of the case.

(Government's Exhibit 3 received in evidence.)

Q Agent Hall, on one side of the gun there is a lever,

[35] do you see that?

A Yes, sir.

Q Are you trained in the use of handguns?

A Yes, sir.

Q What is that lever for?

A It's a safety.

Q What is its function?

A When the safety is on, the gun can't be fired, and when the safety is off, the gun can be fired.

Q In what position was the safety lever at the time you seized the gun from defendant Alsondo?

A The safety was off.

Q In other words, the gun was in a firing condition?

A Yes, sir, and there was a bullet in the chamber.

Q Could you put the lever in the safety-off position?

A This is how the gun was when I got it from him (indicating.)

MR. ROHRER: May I walk past the jury showing them this?

THE COURT: Has it been established that the gun is presently not loaded? Let the witness establish it by pulling back the barrel.

MR. STONE: I would appreciate that.

MR. ROHRER: I think the safety should remain on.

[36] THE COURT: You may elicit of testimony after the defendant has examined the firearm.

MR. ROHRER: I don't intend to pass it to the jury, your Honor, just to display it.

THE COURT: All right, then you may take it back.

MR. ROHRER: I will just hold it down.

Q Agent Hall, you testified there was a bullet in the chamber. Was this clip that is taped outside—where was that?

A The clip was in the gun.

Q Let me make sure I am right. The safety is on now, is that right?

A Yes, sir, the safety is on now.

Q You said Agent Lightcap ran into the living room. Did you see what happened in the living room as he went in there?

A I didn't see most of what happened, no.

Q Did you see any of what happned?

MR. KRIEGER: Objected to, the answer is improper. I didn't see most of what happened.

Q Well, what, if anything, did you see in the living room?

A I saw Agent Litghtcap run toward the door, I saw him run toward the living room and make a right hand turn which would be toward the front door. And that's about all I saw.

[37] Q Did you eventually go into the living room yourself?

A Yes, I did.

Q What did you do with defendant Alsondo?

A I handcuffed him and he was on the floor, face down, in the hallway.

Q And what happened when you went into the living room?

A Rosa and Farr were also in custody. Agent Lightcap. Farr was in the dining room. I think they were both in the dining room area, lying face down.

Q Do you know whether or not they were both conscious?

A Yes, they were both conscious.

Q How about Alsondo?

A Yes, he was.

Q Did there come a time when other agents came up to the apartment?

A Yes, sir.

Q What happened when they came up to the apartment?

A They conducted a search of the apartment, and Agent Wilson found—

MR. BELLANTONI: I object to what Agent Wilson found, your Honor.

THE COURT: Unless it was in his presence.

Q Did you see him?

[38] A Yes.

THE COURT: Overruled.

Q What did you see?

A I saw him open up the closet door and pull Feola out of the closet.

Q Do you see the person he pulled out of the closet in the courtroom?

A Yes, I do.

Q Could you point him out?

A He is sitting with the light plaid suit on and blue tie, he has his hand on his face, with the mustache.

MR. ROHRER: May the record identify he identified the defendant Ralph Feola, your Honor.

THE COURT: Yes.

Q Did there come a time when you learned whose apartment that was?

A Yes, sir.

Q Whose was it?

A It was the man who was tied up in the closet, in the bedroom closet.

Q What was his name?

A His name was Nilo Tanderone.

Q He was the man you saw tied in the bedroom closet, tied and gagged?
[39] A Yes, sir.

* * * *

[47] HALL—CROSS

Q Now, when you got into the door, you were in back, Alsondo's back was toward you, right?
A Yes.
Q And, then you say you saw a gun. Did you actually see a gun?
A Yes, I did.
Q Did you see it drawn by Alsondo?
A I saw it half drawn.
Q Half drawn. The other half?
A When I first saw the gun, it was half drawn.
Q Was the other half in his waistband?
A To the best of my recollection, the tip of the gun was still in his waistband.

* * * *

[146] MR. ROHRER: Your Honor, the government has discussed with counsel a stipulation concerning these exhibits and with your permission, I would like to read it into the record now.
MR. STONE: No objection, your Honor.
[147] THE COURT: Is this a written stipulation?
MR. ROHRER: No, it's an oral one, just to read into the record.
THE COURT: You may read it and see if they so stipulate it.
MR. ROHRER: "If Michael D. Sougros, a U. S. chemist, were called to testify at this trial, he would testify that the substance in Government's Exhibits 2-C, 2-D, 2-E and 2-F is sucrose, which is a form of sugar, having a net weight of approximately two thousand twenty-seven point five grams."
The government offers with that stipulation, Government's Exhibits 2-C, through 2-F.

THE COURT: Do each of you so stipulate, gentlemen?
MR. LENEFSKY: So stipulated.
MR. STONE: So stipulated.
MR. KRIEGER: Yes, sir.
MR. BELLANTONI: Yes, sir.
THE COURT: It will be received in evidence.

(Government's Exhibits 2-C, 2-D, 2-E, 2-F received in evidence.)

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[170] DIRECT EXAMINATION OF
IRVIN LIGHTCAP

BY MR. ROHRER:

Q Mr. Lightcap, are you a special agent with the Bureau of Narcotics and Dangerous Drugs?
A Yes, sir, I am.
Q How long have you been an agent?
A Approximately two years.
Q And you were an agent on August 31, 1972, is that correct?
A Yes, sir, I was.
Q On that day, were you with Special Agent Jeffrey Hall from the Bureau of Narcotics?
[171] A Yes, sir.
Q What did you do?
A I was operating in an undercover capacity with Agent Hall. We went to the vicinity of East 50th Street and Second Avenue in New York City.
Q Did you meet anyone there?
A Yes, sir, we did.
Q Who did you meet there?
A We met defendant Farr, an informant, and defendant Rosa.
Q You stated the name Farr. Do you know the first name of that person?
A I believe his name is Michael Farr.
Q Do you see him in the courtroom?
A Yes, sir, I do.

MR. KRIEGER: Conceded, my client is seated in back of me, Mr. Farr.

A Yes, sir.

Q Do you know this Rosa's first name?

A Yes, his name is Henry Rosa.

Q Do you see him in the courtroom?

A Yes, sir, he is seated behind Mr. Stone.

MR. STONE: Identity is conceded, your Honor.

Q Now, what happened at this meeting?

[172] A Agent Hall and myself parked the vehicle. We engaged in conversation with Mr. Rosa and Mr. Farr.

Q Can you relate, stating as you do so, who said what?

A Yes, sir. We were motioned by Mr. Rosa to enter Farr's vehicle, I believe it was a late model Chevrolet which was parked in front of the government vehicle. Agent Hall and myself entered the rear seat, defendant Farr and defendant Rosa entered the front seat.

Q Was there a discussion in the car?

A Yes, sir, there was. Defendant Farr informed Agent Hall that his people had approximately a half-kilogram of pure heroin to sell to Agent Hall and that they wanted seventeen thousand for it.

Q What else was said, if anything?

A Defendant Farr recalled Agent Hall that he had been up in an apartment on the West Side of Manhattan earlier in the day, had observed the heroin in question and a large quantity of cocaine and marijuana.

Q Did Rosa say anything?

A Defendant Rosa was introduced by Farr to Agent Hall and myself as Henry.

Q Beg your pardon, as what?

A Farr introduced defendant Rosa to myself and Agent Hall as Henry. Defendant Rosa appeared very impatient, and [173] I recall him mentioning something about his people didn't like to be kept waiting, at that time he requested to see the money, Agent Hall displayed a seventeen thousand dollar flashroll, defendant Rosa, I believe Defendant Rosa counted the money, said that everything seemed to be in order.

Q Who said that?

A Defendant Rosa.

Q Did he say anything else?

A Just that—no, at that time, I think he said that he wanted to go up to the apartment, that the deal would take place in an apartment on the upper West Side.

Q What did the people in the car do then?

A At that time, defendant Rosa, myself, and Agent Hall exited Mr. Farr's vehicle, and we entered the government vehicle, along with the informant.

Q Where did you go?

A We went to an apartment located, I believe, at 155 West 68th Street.

Q Were you directed there by anyone?

A Defendant Rosa instructed Agent Hall how to proceed to the vicinity of the apartment.

Q Was anything said in the car while you were traveling there?

A Yes. To the best of my recollection, immediately [174] after getting in the car, defendant Rosa I noted had been looking at me, when we were on the street prior to getting in the car, after we got in the car, defendant Rosa got in the back with me, and Agent Hall and the informant were in the front seat. Defendant Rosa mentioned to me if I had a gun, he says, I thought I saw a gun on you.

MR. KRIEGER: If your Honor please, may I respectfully request an admonition to the jury that the defendant Farr, not being present at any conversation which is alleged to have taken place without his presence is taken subject to connection, if any.

MR. LENEFSKY: Yes, we make the same application on behalf of Alsondo.

THE COURT: Yes, I mentioned this to you before, and I will comment on it in detail at the conclusion of the case when I give you my instructions as to the law, but unless and until there is proof satisfactory to you, independent evidence of the existence of the conspiracy, then unless and until that is the state of the case, you can't consider as evidence against a non-present defendant anything which any of the other defendants said or did

or anything which was said or done in their presence but not in the presence of the absent defendant. That evidence is presently being taken subject to connection.
[175] All right.
Q Do you recall where you were?
A Yes, sir, at the part where Mr. Rosa asked me if I had a gun, I told him no, that I do not have a gun. I recall his words were that we were going to meet the big man, that he was the man's bodyguard, and that his purpose was to make sure the money was in order and that there were no guns.
Q You are saying that he, Rosa, was the man's bodyguard?
A Yes.
Q And what his purpose was.
Did you in fact have a gun?
A Yes, sir, I did.
Q Where was it?
A It was on the left side in my waistband.
Q Did you state that Farr traveled to the apartment?
A Yes, sir, Farr stayed in his vehicle and he followed us, I periodically looked back and saw him in his vehicle following us.
Q What happened when you got to 155 West 68th Street?
A Mr. Rosa instructed Agent Hall to pull the government vehicle in an underground parking lot and park, and shortly after we arrived, Mr. Farr arrived behind us and we all parked our vehicles and exited the vehicles.
[176] Q What happened when you exited the vehicle?
A Mr. Farr joined us, Agent Hall and—oh yes, Agent Hall asked Farr if everything was all right. I explicitly remember Mr. Farr telling Agent Hall, you're finally going to get to meet Ralph.
MR. BELLANTONI: Your Honor, I object to this at this time.
THE COURT: I will take it subject to connection the same as I previously ruled.
Q Go on.
A And all four, we all proceeded to Apartment 405 on the fourth floor of the building.

Q What happened when you got to 405?
A Mr. Rosa knocked on the door, a short while later, we were admitted into the apartment by Mr. Alsondo.
Q You are pointing to someone here in the courtroom?
A That's the gentleman next to you, with the red tie and the sunglasses.
MR. LENEFSKY: Indicating Alsondo.
Q He's the person who opened the door and let you in?
A That's right.
Q What happened after you got into the apartment?
A I remember Agent Hall asking Mr. Alsondo how many people were in the apartment, and I remember something about [177] Mr. Alsondo saying to Mr. Rosa, I believe, the old man is in the bedroom, and the stuff is in the bedroom, and everything is okay.
Q Have you worked in an undercover capacity on a number of occasions?
A Yes, quite a few.
Q What did the word "stuff" mean to you?
A I took it to mean the heroin that we were going there to seize.
Q All right. What happened after these events then?
A Mr. Rosa and the informant proceeded into a bedroom of the apartment.
Q Did they come back or did they stay there?
A And the informant returned momentarily after he had entered, said in fact the narcotics were in the bedroom.
Q Did any one go into the bedroom after that?
A At that time, Agent Hall was in possession of the seventeen thousand dollar flashroll, he took the flashroll and he handed it to me, and along with Mr. Alsondo, Mr. Farr and the informant, they re-entered, they all went into the bedroom again.
Q Did anyone come out of the bedroom, after that?
A Moments later, defendant Rosa and defendant Farr came out of the bedroom and went into the kitchen area [178] located on the right hand side of the apartment.

Q Agent Lightcap, when you mentioned the people that went into the bedroom, I don't think you mentioned Rosa but you have him coming out. Did he go in there?

A He went in there with the informant originally and he never came out, the informant came out, and told us that the narcotics were in the bedroom, Mr. Rosa remained in the bedroom.

Q I see. I'm sorry. I misunderstood you. So, it's clear, then, Farr and—

A Then Agent Hall, Farr and Mr. Alsondo proceeded into the bedroom.

Q All right, now, did anyone come out from the bedroom after that?

A Yes, sir, Mr. Rosa and Mr. Farr came out of the bedroom and went into the kitchen area.

Q What did you observe next?

A A few seconds passed by. I walked into the hallway leading into the bedroom.

Q Did you actually enter the hallway?

A Yes, sir, I had entered the hallway.

Q Where was the flashroll at that point in time?

A At that time, I had the flashroll in my possession.

Q Was it in a paper bag?

[179] A It was in a paper bag, I believe I was holding it in my left hand.

Q What did you see?

A I had just entered the hallway when I observed Mr. Alsondo walking down the hallway towards me.

Q Did he do anything?

A At this time, he had his right arm and he was reaching, slowly reaching behind his back. A second after that, he went, he put his hand behind his back, I observed Agent Hall with his weapon drawn standing in the doorway of the bedroom, Agent Hall yelled to me something to the effect that he had a gun, watch it, he has a gun, I believe were his words, and he came after defendant Alsondo from behind with his weapon drawn. And I believe he placed the weapon towards Mr. Alsondo's head, he yelled, "federal agents, you're under arrest," at that time I rushed forward, I dropped the flashroll, I rushed forward and we subdued Mr. Alsondo.

Q Did Agent Hall do anything with his left hand as he came up to Alsondo?

A I couldn't—I believe he grabbed Alsondo's arm because I never observed the defendant's arm coming back out. When I rushed toward the defendant Alsondo, his right arm was maintained behind his back. I saw Agent Hall's right hand, I never saw Agent Hall's left hand.

[180] Q At what point did he shout, federal agents, you're under arrest?

A Just as he had—was within a foot of him, I believe. It was almost right next to him when he yelled, federal agents, and at this time Alsondo turned to the right and then a struggle ensued.

Q Would you describe how he was subdued and what the struggle was like, what happened during it?

A Alsondo had a left hand free at this time, he swung toward me, he saw me coming, I hit the defendant, I would say twice, as hard as I possibly could, I was right on top of him, I grabbed him by the hair, defendant Alsondo, Agent Hall and myself went to the floor, we fell backwards, I fell on top of Alsondo, at this time I had hold of his head, crashed, it was a linoleum floor, crashed to the floor, at that time for a split second, I saw Agent Hall in possession of another revolver in his left hand. At that time I rushed into the other room and effected the arrest of defendant Rosa.

Q Can you describe that weapon you saw just for that brief instant in Agent Hall's hand?

A I remember it as a black automatic.

Q Let me show you Government's Exhibit 3 in evidence. Can you identify that?

A Yes, sir. This is the weapon that was seized off [181] Mr. Alsondo.

Q Now, you said that you rushed back into the living room. Can you describe in as much detail as you can recall what happened from the instant you got up from subduing Alsondo.

A Well, I realized there were still two defendants in the front room, I was afraid—

MR. KRIEGER: Objected to, your Honor.

THE COURT: Yes, it calls for the operation of his mind. You may reframe it.

Q Just what you did.

A As I was rushing down the hall, I observed defendant Rosa coming towards me. I grabbed him and yelled, "Federal Agents", at which time Defendant Rosa, I believe, with his right hand pushed me away, started heading for the door at which time I grabbed him again and hit him, he went back against the hall, at this time I had my revolver drawn, I placed him under arrest and used him as a shield to walk towards the kitchen area where defendant Farr was crouched in a corner with his hands over his head.

Q What did you do next?

A I informed Mr. Farr that he was under arrest, I threw Mr. Rosa to the floor, face down, and I instructed Mr. Farr to lay down next to him, put his hands over his head. [182] As this time, I conducted a search for any more weapons.

Q Did you handcuff either of these individuals?

A No, sir, I did not.

Q What happened after you conducted a search of these two people?

A Agent Hall informed—instructed the informant to summon the surveillance agents for assistance. At that time, I stayed in the room with defendant Rosa and defendant Farr, while they were laying on the floor. Shortly after the informant left, the surveillance agents came into the apartment.

Q Let me go back just a step. Back to the point where you testified that you saw Alsondo coming down the hall, moving his right hand behind him.

What did Agent Hall shout about that point?

A "Watch out, he has a gun."

Q Can you state your reaction to that statement?

MR. LENEFSKY: Objected to.

THE COURT: Sustained.

MR. ROHRER: Your Honor, may we approach the side bar for a brief moment.

THE COURT: Yes.

(At the side bar.)

THE COURT: You see, I ruled based on the form of [183] the question. If the question was intended to elucidate what did he do, but that's his reaction, isn't it. My reaction was I drew my gun.

MR. ROHRER: Your Honor, an essential element of the government's case when you are talking about assault is putting someone in fear of receiving a battery. I think that's the classic definition and the one that's in our request to charge.

THE COURT: Isn't that judged objectively, not subjectively?

MR. ROHRER: Well, the government believes that this agent's feeling that he was going to be shot was very significant when the jury considers whether or not he was placed in fear of receiving a battery.

THE COURT: Do the rest of you want to be heard?

MR. KRIEGER: No, sir. I think you might be able to elucidate his state of mind, but the present question is bad as to form.

(In open court.)

Q What was your state of mind at the time of these events we are just talking about?

MR. LENEFSKY: Objected to.

THE COURT: Well, now, I will permit the witness to be asked whether he believed the statement said to have been [184] made to him by Mr. Hall, did he have any reason to believe it wasn't true or correct.

MR. ROHRER: Thank you, your Honor.

Q Did you believe Agent Hall's statement that this person had a gun?

A Yes, sir. I did.

Q Now, coming back to where we were, you stated that you searched Rosa and Farr, is that correct?

A Yes, sir.

Q What happened after that?

A I stayed with the defendants, kept them laying on the floor, my weapon drawn, the surveillance agents came in, I believe they removed the other defendant, Mr. Tanderone from the bedroom, the closet where he was

tied and gagged, and they conducted a search of the apartment.

Q Do you know whether or not they found anything in conducting that search?

A While they were conducting the search, well, Agent Wilson, I believe, was conducting a search of the hallway area and the closet, he came across Mr. Feola who was hiding in a closet.

MR. BELLANTONI: I object to the characterization of hiding, your Honor.

THE COURT: Well, that's a question the jury will [185] have to infer from the evidence. He may describe what he found in the closet or who he found in the closet.

Q You pointed to someone when you said Agent Wilson found Mr. Feola in the closet. Were you present when Agent Wilson found Mr. Feola?

A Yes, sir, I was.

Q Could you indicate for us specifically who you pointed to?

A Mr. Feola is the gentleman with the brown tie and mustache.

Q At the far end of the table from me?

A Yes, sir.

Q Did he have a mustache on that day?

A No.

Q Where were you sitting in relation to the closet where Mr. Feola was found?

A Prior to his being discovered there, my back was to the closet at all times.

THE COURT: When you opened the closet, was he standing or was he seated?

A I turned when Agent Wilson opened the closet and I observed Agent Wilson remove Mr. Feola from the closet. I couldn't see whether he was standing or crouched.

THE COURT: How big a closet was it?

[186] A I guess you would call it a regular size closet, had suitcases in it—almost like a small walk-in closet.

Q After Mr. Feola's arrest, did you obtain anything from him, any papers of any kind?

A Yes, sir, we seized personal papers, you know, valuables, jewelry, things of that sort, telephone books.

Q Did he have more than one telephone book?

A I don't recall exactly having more than one.

Q He had at least one?

A Yes, sir.

Q What did you do with that phone book?

A Mr. Feola came to the office—I don't recall the exact date—he requested that we return his personal property to him and at that time I made copies of Mr. Feola's phone book, and I returned the original phone book and what other personal property he had to Mr. Feola.

Q Let me show you Government's Exhibit 4 for identification. Would you examine it and see if you can identify it?

A Yes, sir, these are the xerox copies of Mr. Feola's phone book.

* * * *

[309] DIRECT EXAMINATION OF FRANKLIN VELIE

BY MR. ROHRER:

Q Mr. Velie, do you know a person named Ralph Feola?

A Yes.

Q Do you see him in the courtroom?

A Yes, he's at the end of defense counsel table, red sport coat, hand to face.

MR. ROHRER: May the record reflect that Mr. Velie has identified Mr. Feola.

Q When was the first time you saw him?

A Early September of 1972 in my office in this building on the third floor.

* * * *

[312] Q Did you discuss and ask questions concerning the charges which you told him were being brought against him?

A Yes, I did.

Q In connection with that latter point, that is, the charges being brought against him, can you recall the questions you asked and his responses, putting aside the pedigree and [313] background information?

A I think I asked him what happened last night or something like that, to get his version of the facts underlying his arrest, and I recall that he said—he denied he had anything to do with any sale of narcotic drugs. He said, "I had nothing to do with narcotic drugs," and he said that "the stuff you seized is sugar." He said that he was present in the apartment where the arrest had taken place, a priest's apartment, but that he had heard a loud noise, a commotion of some kind and had hidden in a closet and I asked him if he knew any of the other people who had been arrested with him, Michael Farr, Henry Rosa, Enriquito Alsondo or the priest, Mr. Tanderone, and he said he never saw those people before. He didn't know them.

Q You actually mentioned these people by name?

A Yes, I think I had the draft complaint in front of me and I was reading from the box caption.

Q Do you see any of those other people in the courtroom?

A Yes, Mr. Alsondo is sitting—

MR. LENEFSKY: Indicating Mr. Alsondo.

Q And Mr. Rosa?

A Mr. Rosa is wearing a grey suit and has a blue tie.

MR. ROHRER: Indicating the defendant Rosa.

[314] A Michael Farr has a red tie, blue suit, long hair.

Q As you asked this, do you know where these other people were physically?

A All of them, except for Mr. Alsondo, were out in the anteroom, and I indicated that, "I mean the people sitting outside, sitting with you a moment ago."

Q And his answer was he had never seen these people before?

A Yes.

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[328] DIRECT EXAMINATION OF CATHERINE HALL

BY MR. ROHRER:

Q Miss or Mrs.?

A Mrs.

Q Mrs. Hall, by whom are you employed?

A The Wyndham Hotel, Five Hudson Street, Yonkers, New York.

Q How long have you been employed there?

A Three years.

Q So you were employed there all during 1972?

A Yes.

Q Do you know a person named Alsondo?

A Yes.

Q,Do you see him in the courtroom?

A Yes.

[329] Q Would you point him out?

A Right there.

Q The person sitting next to me?

A Yes.

MR. ROHRER: May the record reflect she has identified Mr. Alsondo?

THE COURT: Yes.

Q What do you know his first name as?

A Tito.

Q Do you know him by any other first name?

A No.

Q How do you know Mr. Alsondo?

A He was a resident of the hotel.

Q Was he a resident there during the summer of 1972?

A Yes, he was.

Q Do you recall the last date he was a resident?

A The last day he appeared in the hotel was August 29, I think.

Q 1972?

A Yes.

Q Let me show you Government's Exhibit 4 in evidence, and ask you to look at the phone number under the name Tito.

Before you do that, this is on the fourth page, although they are not numbered. Do you see that?

[330] A Yes. 969-4967.

Q Do you recognize that number?

A Yes, it's the Hotel Wyndham's number.

Q That was the number of the hotel all during '72?

A Yes.

Q During the summer of '72?

A Yes.

Q Would you look at another name here under that number and the name is Tanderone, with a number there?

A Yes.

Q Do you see that number?

A Yes.

Q What is the number?

A It looks familiar—

MR. BELLANTONI: I object to bringing in numbers through this witness.

THE COURT: He is asking her what she knows about the number. I will strike out the number that looks very familiar.

Q Do you recognize it, and if so, how?

A That is the number Tito gave me to give somebody else to call.

Q Can you read that number?

A 724-8357.

[331] Q You say that Tito gave you that number for somebody else to call. To whom were you to give this number?

A To a person called Ralphy.

THE COURT: I think we should have the time and place of this conversation.

MR. ROHRER: Of course.

Q Do you recall when Tito gave you the number and asked Ralphy to call?

A I would say it was in the spring, the first time.

Q The spring of 1972?

A Yes.

Q Did Tito say anything else about the number of Ralphy?

A No, to give him that number if he called quite a few times, and after that I had another message to give him.

Q What was the other message?

A He would be at West 64th Street.

Q You are sure it was West 64th Street?

A I certainly do because that is all I put down.

Q West 64th?

A Right.

West 68th, I'm sorry.

Q Are you sure?

A Yes, now I am sure definitely.

[332] Q Was it more than one occasion on which Tito left this message for Ralphy?

A The message, continuously all summer long. He would be there at a certain time, and that was that.

MR. BELLANTONI: I have to object to this. Unless she specifies the dates—

THE COURT: Are you the desk clerk there?

THE WITNESS: Yes.

THE COURT: Did he leave these messages through you?

THE WITNESS: Yes, he called me and told me if Ralphy called to be at West 68th Street.

THE COURT: Would that be more than once during the summer?

THE WITNESS: Yes, that's how I remember.

THE COURT: I will allow it.

Q You said it happened all during the summer of '72?

A Yes.

Q This includes August of '72?

A Yes.

Q Did you ever have occasion to meet a person named Ralphy?

A Yes, I did. That was in November.

Q November of what year?

[333] A November '72.

Q Where did you meet him?

* * * *

A At the Wyndham Hotel.
Q What was the occasion for that meeting?
[334] A He came to pick up Mr. Alsondo's belongings. They were personal belongings.
Q Were there any phone calls from Ralphy that preceded this meeting?
A Yes, he called and said to check him out of his room and he would have somebody pack his belongings up, and he would take care of it and come down and pick his things up.
Q Who called?
A Ralphy.
Q Did he say anything about Tito?
A I asked how he was, and he said he was sick and he was upstate.
Q You say you met with Ralphy?
A That is the only time I met him.
Q Sometime in November?
A Yes.
Q You recognized his voice as the voice you heard over the telephone?
A Yes, I heard it so many times.
Q Do you see Ralphy in the courtroom?
A I think that is he, but he didn't have a mustache.
Q You are indicating a man farther away from me?
A Yes, and he didn't have dark hair then, his hair was lighter.
[335] Q Did he pick up Tito's belongings on that occasion?
A Partial, and he said he would be back for the rest and he wanted some mail, and I would not give him the mail unless I had a letter from Tito telling me to give him the mail.
Q Did he ever come back?
A No, he never came back.

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[341] DIRECT EXAMINATION OF
CORNELIUS O'DONNELL

BY MR. ROHRER:

Q By whom are you employed?
A The New York Telephone Company.
Q How long have you been employed there?
A Seventeen years.
Q What is your job there?
A Security agent.
Q In your capacity as security agent, are you familiar with the records and record keeping practices of the telephone company?
A Yes I am.
MR. ROHRER: May this be marked as Government's Exhibit 5 for identification, it's two cards, a white one and an orange one.

(Government's Exhibit 5 marked for identification.)

Q Let me show you Government's Exhibit 4 in evidence. I show you the number under the name Tanderone. What is that number?
A 724-8357.
[342] Q I show you Government's Exhibit 5 for identification. Would you briefly describe what that is rather than telling us what is in it?
A These two cards here, one card is known as a service record card held by the commercial department in the course of business, and the other card is known as a credit card also held by the commercial department of the New York Telephone Company.
Q From those records—don't tell us what the answer is—from those records, can you tell who the subscriber is or was in 1972 for 724-8357?
A Yes, I can.
Q Are these records kept in the ordinary course of the phone company's business?
A Yes, they are.
Q Is it the ordinary course of the phone company's business to keep such records?

A Yes.
Q Are the entries made on those records made at or about the time of the event or transaction they record?
A Yes, sir.
MR. ROHRER: The government offers Exhibit 5, your Honor.
MR. LENEFSKY: No objection.
[343] MR. BELLANTONI: I have no objection.
THE COURT: Received.

(Government's Exhibit 5 received in evidence.)

THE COURT: Does that show the address of this telephone exchange?
MR. ROHRER: Yes, it does.
Q Putting Government's Exhibit 5 in evidence in front of you, first off, can you tell us who the subscriber is for that number and for what period of time?
A The service record card reflects that the listed name is Tanderone, and the first name is Oswaldo.
Q What about the address?
A 155 West 68th Street.
Q What is the apartment number?
A Located fourth floor, Apartment 405.
Q Was the service or the number at that address changed at any time, incidentally?
A Yes, the service record card reflects that the number of 724-8357 was changed to 595-8905 on 12-19-72.
MR. ROHRER: May I pass this to the jury?
THE COURT: Does it show when the service began at that name and that address?
Q Can you tell us from the record when the service began?
[344] A The credit card reflects that the telephone number 724-8357 was completed installation on 3-3-72, sir.
Q March 3, 1972, correct?
A Yes, sir.
MR. ROHRER: May I now pass it to the jury, your Honor?
THE COURT: Yes.

MR. ROHRER: May these be marked as Government's Exhibit 6 for identification, please.

(Government's Exhibit 6 marked for identification.)

Q Again, looking at Government's Exhibit 4 in evidence—
THE COURT: Perhaps you should wait until the jury has had a chance to look at the exhibit. You are asking them to do two things at once.
MR. ROHRER: Excuse me. I will just sit and wait, then.
THE COURT: You may resume, Mr. Rohrer.
Q I show you Government's Exhibit 6 for identification. Can you just tell us what those cards are?
A Four service record cards held by the commercial department, New York Telephone Company.
Q Let me show you Government's Exhibit 4 in evidence [345] again, page ten. If you look at the top line on your left, do you see the name Mike Farr?
A I do.
Q And you see the number next to that. What number is that?
A 967-1953.
Q Can you just state again from looking at Government's Exhibit 6 for identification, can you tell who the subscriber is for that particular number?
A Yes, I can.
Q Is that a record kept in the ordinary course of the telephone company's business?
A Yes, it is.
Q Is it the ordinary course of the phone company's business to keep such records?
A Yes, sir.
Q And are the entries made on those records made at or about the time of the event or transaction which is recorded?
A Yes, sir.
MR. ROHRER: The government offers Exhibit 6, your Honor.

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[347] (Government's Exhibit 6 received in evidence.)

THE COURT: You may continue, Mr. Rohrer.

Q Can you tell us from these records who the subscriber to 967-1953 was during the year 1972?

A This is a change of party in main listing reflected and it reflects that on July 24, the listing was changed—

THE COURT: What year?

THE WITNESS: July 24, 1972.

The listing was changed from the old listing, which [348] was prior to 24-7-72 under the name of Farr, J., and on the 24th of July, 1972, the listing was changed to a party by the name of Ritter, first name, Anthony, Jr. The address naturally remained the same, private house at Pleasant Ridge Road, Harrison, New York.

Q Did the service continue throughout '72? Let's put it this way: Was it in service in August and September of '72?

A Yes, I would say it was still in service.

• • • •

[350] MR. ROHRER: The government just has two brief stipulations which it would like to read into the record at this time.

THE COURT: All right.

MR. RORHER: First, it's stipulated and agreed by and between the government and counsel for Henry Rosa that when the pedigree statement, that is, the background statement, was taken from Mr. Rosa by an agent of the Bureau of Narcotics and Dangerous Drugs, Mr. Rosa freely and voluntarily gave his address as 155 West 68th Street, Apt. 405, New York, New York and his telephone number as 212-724-8357.

MR. STONE: So stipulated, your Honor. I have discussed this with Mr. Rosa and that is a true statement of fact.

THE COURT: During August of '72?

MR. STONE: During the time of the arrest, yes, your Honor.

MR. ROHRER: It's stipulated and agreed by and between the government and counsel for defendant Michael Farr that Mrs. Farr, who is the same person as Mrs. Ritter, and who resides on Pleasant Ridge Road, Harrison, New York, and whose name appears in Government Exhibit 6 in evidence, is the mother of the defendant, Michael Farr.

MR. KRIEGER: That is correct, sir.

[351] THE COURT: Back to Mr. Stone, it isn't enough to know whether it was the address. Was he there all of August?

MR. ROHRER: The government assumes that the stipulation covered the month of August.

MR. STONE: We will stipulate it was the month of August.

THE COURT: He lived there during the month of August and that was his phone number?

MR. STONE: Yes.

THE COURT: All right.

MR. ROHRER: With that, your Honor, the government rests.

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[391-1] DIRECT EXAMINATION OF
RALPH FEOLA

Q What is your address?

A 16 North Broadway, White Plains, New York.

Q I direct your attention to August 31, 1972. Were you in the City of White Plains on the morning of that day?

A Yes, sir.

Q Did there come a time when you left White Plains?

A Yes.

Q Would you tell the jury and the Court where if any place you went?

A I went down to Manhattan for the day and I stopped at an apartment in the City.

Q Do you know whose apartment that is?

A Yes, I do.

Q Whose is that?

A Mr. Tanderone, he is a medium, a spiritualist.

Q Does he have a church in his house?

A Yes.

Q Have you been there on prior occasions?

A Yes.
Q Approximately how many prior occasions?
A That was about the third time.
[391-2] Q August 31 was the third time?
A Yes.
Q Do you recall what time you went to the apartment? That is approximately.
A 2:30, three o'clock.
Q Did you knock on the door?
A Yes, I did.
Q Did anybody answer the door?
A No.
Q What did you do then?
A The door was open. It was partially opened.
Q What happened?
A I walked into the room, the foyer. I didn't just want to walk in. I knocked like that and as I walked in ten or 15 feet I saw Mr. Alsondo.
Q When you immediately walk into the apartment what is to the right?
A The church.
Q When you say a church would you tell the jury exactly what it is?
A It's an altar. It's not a big church. The man is a medium, it's a spiritualist. He can look at you and tell you things nobody else can tell about you. The man has a big following. You go up there and there are five, seven [391-3] people.
THE COURT: He is not describing the room, strike it out.
Q Describe the room.
A They have a statue of a madonna, pictures of Christ.
Q How many religious symbols would you say are in the room?
A Maybe ten.
Q When you walked into the apartment did you see anybody?
A Yes, I did.
Q Who did you see?
A Tito.

Q Do you know Tito?
A Yes.
Q Did you know him before that day?
A Yes.
Q For approximately how long did you know him?
A Less than a year.
Q Did you know Henry Rosa?
A Yes.
Q How long did you know him?
A From today?
[391-4] Q From August 31.
A About four, three months.
Q Did you know Michael Farr?
A Yes.
Q How long did you know Michael Farr?
A A couple of years.
Q Michael Farr lives in Westchester County, does he not?
A Yes, about three, four miles from me.
Q So you saw Mr. Alsondo?
A Yes.
Q Did you see anyone else?
A No.
Q What did you say to him and what did he say to you?
A I said hi "Tito" and he said hi. I said is the priest home, the padrone.
Q Who?
A Out of respect he has to be addressed good father.
Q What did "Tito" say to you?
A As we were talking there was a door knock and I said "Where is the old man" and he said "Get out of here, it's none of your business" and I went into the living room and he pushed me in the closet.
THE COURT: Who is the he?
[391-5] THE WITNESS: Mr. Alsondo.
Q Where is that closet located?
A From the door to here.
Q Approximately five feet from the front door?
A Four feet.
Q What was in that closet?

A A lot of clothes, bags.
Q Suitcases?
A Yes.
Q Did there come a time when you heard a noise?
A Yes, I heard a lot of noises.
Q What were the noises you heard?
A There were people in the apartment, a lot of people came into the apartment. I heard voices. I couldn't make out the voices. I heard—I don't know if I actually heard Federal agents but I heard a lot of screaming and I got very, very scared.
Q You heard a lot of screaming?
A Yes.
Q What else did you hear?
A A lot of screaming, you know, beatings and people—
MR. ROHRER: You can't hear a beating.
THE COURT: You heard some noise?
THE WITNESS: Yes.
[391-6] Q Did you hear voices yelling?
A Yes
Q What were the voices saying?
A The voices weren't saying much, stop, please, you are getting beat up.
MR. ROHRER: Objection.
THE COURT: Strike it out.
Q In any event, you heard a lot of noise?
A Yes.
Q Did there come a time when you opened the closet?
A I was too scared to open it.
Q Did there come a time when the closet was opened by someone else?
A Yes, it was.
Q Would you show the jury in what position you were when the closet was opened?
A I was sitting down. I was like on a box and when they opened the closet I had my hands—I don't know who they were, I don't know if my hands were like this or like that and they took me out of the closet. They said police officers.
Q Were you ushered into the living room in that apartment at that time?

A Yes.

* * * *

[393] Q After you left Mr. Tanderone in the closet, what did you do then?
A I then went back out in to the main area of the apartment and started searching, looking through the apartment [394] for other defendants, weapons, etcetera. About three or four minutes later, I started in the living room, bathroom, hall closets. Three or four minutes later, I came back into the room that leads to the exit of the entrance of the apartment and I found the defendant Feola in the hall closet.
Q Up to this point in time, did you hear any shouts, screams or any kind of protestations?
A No, sir, I did not.
Q Incidentally, going back a step, how long after the informer got down to you that you got up to the apartment?
A I would say approximately two to three minutes.
Q You say you found the defendant Feola in the closet?
A Yes.
Q Do you see Feola in the courtroom?
A Yes.
Q Would you point him out?
A He's the gentleman at the end of the bench with the mustache and maroon jacket.
MR. ROHRER: May the record reflect he has identified Mr. Feola.
THE COURT: Yes.
Q What was his position when you first observed him in the closet?
A When I opened the closet door, he was in a squat-
[395] like position. In other words, he was crouched.
Q Where were his hands?
A Well, as I opened the door, I had my weapons drawn and his hands went up to shield his face.
Q What did you do then?
A I told him to put his hands on his head.
Q Where did you take him?

A I assisted him up and took him into the dining area and I had no cuffs at the time, so I told him to lie face down in the dining room, put his hands behind his back.

* * * *

[512] COURT'S INSTRUCTIONS TO JURY

* * * *

In order to convict a defendant on the first count, that is, the conspiracy count, the government must prove to your satisfaction beyond a reasonable doubt the following essential elements:

One, the existence of the conspiracy charged in the indictment.

Two, that the defendant knowingly associated himself with the conspiracy, that is, as I will explain to you later, you must treat the case of each defendant separately and

Three, that one of the conspirators in the Southern District of New York, that is in this instance Manhattan, committed at least one of the overt acts specified in the [513] indictment at or about the time and place alleged therein.

It's not required that the government prove that a conspiracy stated and ended on the dates alleged in the indictment. It's sufficient if you find that in fact a conspiracy was formed and existed for some time within that period and that at least one of the overt acts was committed in furtherance of the conspiracy. The offense of conspiracy, members of the jury, is complete when the unlawful agreement is made and any single overt act is thereafter knowingly committed by at least one of the co-conspirators in furtherance of the purpose of the conspiracy.

What is a conspiracy? It's a combination of an agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose as charged in the first count to forcibly assault, resist, impede, and interfere with the agents of the Bureau of Narcotics

and Dangerous Drugs in the performance of their official duties.

In this connection, it is not necessary for the government to prove that the defendants or any of them knew that the persons they were going to assault or impede or resist were federal agents. It's enough, as far as this particular element of the case is concerned, for the government to prove that the defendants agreed to conspire to commit an assault.

[514] An assault is defined as an unlawful attempt or offer through force and violence to do injury to the person of another with such apparent present possibility of carrying out such a threat as to put the person against whom the attempt was made in fear of personal violence. The drawing of a handgun against another person would be an assault. A robbery is the stealing of property or money from a person by the use or threat of physical force, such as a handgun. It includes an assault so that if you find that a purpose of any conspiracy was to rob agents Hall or Lightcap of seventeen thousand dollars in cash, that would constitute an assault and such proof would be sufficient insofar as this particular element of the case is concerned.

A person commits larceny when with the intent to deprive another of his property or to appropriate the same to himself or a third person he wrongfully takes, obtains or withholds such property from the owner. Larceny does not involve an assault. Therefore, if you find that a conspiracy existed among these defendants or some of them, and the conspiracy's only purpose was to commit a larceny or to commit a fraud upon Agents Hall and Lightcap by selling them sugar, which the agents thought to be heroin, this will not support a finding by you that the defendants are guilty on Count One, if that is all they did.

* * * *

[520] It's the government's contention as to this conspiracy that its object or purpose was getting away from Agents Hall and Lightcap, the so-called flashroll, containing seventeen thousand dollars in currency which

the government contends the agents had with them at the apartment. And that this money was to be obtained either by fraud, that is by selling them sugar in place of heroin, and by assaulting or in effect robbing them of the money if they became suspicious of the heroin and decided to test it. If you find that such a conspiracy existed, then each member of the conspiracy at the time of the commission of a criminal act by one member thereof done in furtherance of the conspiracy will be [521] criminally liable, together with the co-conspirator who performed the criminal act in question. In this case, assaulting a federal officer.

There is no evidence that the defendant Feola personally assaulted any one. Accordingly, in connection with the second count, if you do not find the defendant Feola was a member of the conspiracy and guilty in connection with Count One, you may not find him guilty with respect to Count Two. If you find that he was, on August 31, 1972, a member of the conspiracy and further find that either Alsondo or Rosa assaulted a federal officer on that day in the course of the conspiracy during its existence and in furtherance of its purposes, and that the one who assaulted was also a member of the conspiracy, then you should find Feola guilty of the substantive charge in this Count Two, under the agency theory arising out of a conspiracy, which I previously mentioned to you, pursuant to which every member of a partnership in crime is the agent for the other members as to criminal acts committed during the existence of and in furtherance of the purposes for which the conspiracy was organized.

• • • •

[523] As to the second count, the defendants are charged with having violated Section 111 of Title 18 of the United States Code, which provides in pertinent part that, "Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in Section 1114 of this Title, while engaged in or on account of the performance of his official duties, is guilty of a crime."

Section 1114 of the Code, Title 18, designates among other people an officer or employee of the Bureau of Narcotics and Dangerous Drugs, so reading these two sections of the law together then, an assault on a Bureau of Narcotics and Dangerous Drugs officer, engaged in the performance of his official duties, constitutes a federal crime.

In order to find a defendant guilty, you must be satisfied beyond a reasonable doubt of the following facts: First, that on August 31, 1972, Jeffrey Hall and Irvin Lightcap were employed by the Bureau of Narcotics and Dangerous Drugs. Second, that on that same date, the defendant forcibly assaulted or resisted or opposed or impeded or intimidated or inter- [524] fered with Agents Hall and Lightcap or either of them. Third, that the defendants wilfully did the act or acts charged and, fourth, that at the time the Agents Hall and Lightcap were engaged in the performance of their official duties.

You are instructed that it is not necessary that the government prove that any defendant assaulted, resisted, opposed, impeded, intimidated and interfered with the federal officers as charged in the indictment. It is sufficient that any one of these acts proved as charged. In other words, in the indictment, there is an "and" which connects up all these acts, but the law is that if any one of these acts, assault, resistance, opposition, impeding, intimidating or interfering, was proved, that is sufficient for conviction on that particular charge.

I have previously defined for you what an assault is, that is, an unlawful attempt or offer with force and violence to do injury to the person of another, such as drawing a gun with such apparent present possibility of carrying out such an attempt as to put the person against whom the attempt was made in fear of personal violence, the drawing or starting to draw a handgun in the attempted execution of a robbery would constitute an assault.

The word resistance is defined as follows:

To oppose by physical power, to strive against, to [525] exert once is to counteract, defeat or frustrate.

The word oppose means to resist by physical means.

Impede is defined as stopping progress, to obstruct, to hinder. Intimidate is defined as follows: To make timid or fearful, to inspire or affect with fear, to frighten, to deter, to overawe or to cow somebody.

I believe I have previously mentioned to you that the statute does not require that the defendant know either the identity of the person assaulted or impeading or intimidated or that the person assaulted is a federal officer.

* * * *

SJPREME COURT OF THE UNITED STATES

No. 73-1123

UNITED STATES, PETITIONER

v.

RALPH FEOLA

ORDIR ALLOWING CERTIORARI. Filed April 15, 1974.

Tle petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

U. S. GOVERNMENT PRINTING OFFICE, 1974 [illegible]

Supreme Court, U. S.
FILED
MAR 14 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1123

UNITED STATES OF AMERICA

- against -

RALPH FEOLA

RESPONSE IN OPPOSITION TO PETITION OF UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THIS BRIEF IS RESPECTFULLY SUBMITTED IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE FACTS OF THE CASE ARE SET FORTH IN THE OPINIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT (GOVERNMENT'S APPENDIX A and B).

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to violate a federal law, it is necessary to prove the defendant's knowledge of a jurisdictional element, when such knowledge need not be shown in a prosecution for the underlying substantive offense.

1. It is respectfully submitted to this learned Court that the logical approach to the issue raised in the instant case is that rule of law enunciated in the U.S. v. Crimmins, 123 F.2d 271 (2nd Cir. 1941).

It is respectfully submitted that a conspiracy involves an agreement to perform an offense or criminal act, and accordingly involves a meeting of the minds of the actors. Applying simple logic to the instant case it is submitted that in order for the respondent to be guilty of conspiracy to assault as distinguished from the substantive act of assault he must have, a) agreed to, b) assault, c) a federal narcotics agent. Such an agreement requires specific knowledge of the identity of the victim of the assault.

The fact that specific intent is required for a conviction on a conspiracy count and not on a substantive count is consistent with reason. See U.S. v. Vilhotti, 452 F.2nd 1186 (2nd Cir. 1971) Cert. denied 406 U.S. 947 (1972).

The Government's analogy set forth on pages 11 and 12 of its brief is itself superficially compelling, but it cannot stand the test of logic. For if one can run past a red light on an Indian reservation, where it was planned to disobey the light, but the conspirators were in ignorance of the existence of the Indian reservation, that person could commit and agree to commit the offense without knowing that the light was located on an Indian reservation. Accordingly, said person would be guilty on the substantive count of running past said light under the doctrine set forth in Pinkerton v. U.S., 328 U.S. 640. This is exactly what was decided by the Court of Appeals in the U.S. v. Alsondo, 486 F.2nd 1339 (Government Appendix B). However, that person could not be found guilty of conspiracy to, a) run past a red light, b) located on an Indian reservation, without the requisite knowledge that the light was located on an Indian reservation.

2. The Government in not petitioning for a rehearing with respect to the Court of Appeal's reversal of the conspiracy count did concede and did agree with the rule enunciated in Crimmins. Accordingly, at the rehearing the Government did agree that scienter was necessary to buttress the conviction of respondent on the conspiracy count. See U.S. v. Alsondo, supra where the Court stated as follows:

> "The Government has sought a rehearing of the reversal of the assault convictions of Feola and Rosa. (The Government does not at this time challenge the doctrine of United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941), under which we dismissed the conspiracy counts; that part of the judgment therefore stands)"

It is submitted that the Government has voluntarily acquiesced in, ratified, and recognized the validity of the Crimmins doctrine and is accordingly estopped from changing the theory which it pursued in the Court of Appeals. See U.S. v. Sten, 342 F.2nd 491 (2nd Cir.), and U.S. v. Ballau, 348 F.2nd 467 (2nd Cir.).

As set forth in the Government's petition for Certiorari, at page 3 FN2, the reason that the present petition is sought is that the respondent did not receive a concurrent prison term on the substantive count but instead was sentenced to probation and a fine. This is no reason to grant the instant petition. The fact that he was convicted on the substantive count reduces the importance of the conspiracy count. Consequently the Crimmins doctrine did not pose an obstacle to the instant prosecution for the reason that the substantive offense was consummated.

3. It can be argued that in a prosecution involving interstate transportation of stolen goods and similar type crimes, that the required knowledge of the federal jurisdictional element is illogical and interposes obstacles in the way of prosecution of unconsummated conspiracies. It can also be argued in such conspiracies that knowledge of the federal el-ment can be inferred from the scope of the acts performed and from the duration of the agreement to perform the substantive acts. However, the Crimmins doctrine has been followed in such cases. In a conspiracy for assaulting a federal officer, Crimmins must be followed for the reason that such an offense is more localized and amenable to control by both federal and state law enforcement agencies. Additionally, such an offense is, as in the instant case where alert law enforcement effectively blocked the substantive offense, more amenable to obtaining convictions on the substantive count.

4. Finally, it is requested that in the event certiorari is granted it should be done so with respect to the entire case.

In view of the fact that the conspiracy count was dismissed by the Court of Appeals it is the respondent's position that a fatal chasm was left in the Government's case and that the respondent could not be convicted on the substantive count.

There is no question that respondent could have been convicted on the substantive count without the presence of the conspiracy count under the agency principle enunciated in Pinkerton. However, in such a case it would be incumbent upon the Government to prove that respondent engaged in a criminal

agreement to assault a federal officer by proof of his acts (emphasis supplied) as opposed to heresay declarations made by alleged co-conspirators.

At the trial of the instant case, all of the evidence from which the jury inferred that respondent was a party to an agreement to assault, consisted of heresay declarations of alleged co-conspirators.[1] The heresay was allowed under the exception aforded by the existence of the conspiracy count. It is submitted that this was the basis for the determination that respondent was part of the agreement to assault. When the conspiracy count was dismissed, all of the heresay must be stricken as to respondent, resulting in his acquittal.

---

[1] There was additional proof of a false exculpatory statement made by respondent on the day following the assault and after the alleged conspiracy had ended.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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March, 1974.

Supreme Court, U. S.
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No. 73-1123

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH FEOLA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
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REPLY MEMORANDUM FOR THE UNITED STATES

Respondent suggests (Memo. in Opp., p. 3) that the United States is estopped from challenging the *Crimmins* doctrine because it did not seek rehearing in the court of appeals of the reversal of petitioner's conspiracy conviction.

The government did not ask the Court of Appeals for the Second Circuit to reconsider *Crimmins* because it would have been futile to do so. Every active judge in that Circuit (except Chief Judge Kaufman) had previously (and recently) voted in support of the *Crimmins* rule. *United States* v. *Alsondo,* (Pet. App. A) (Friendly, Feinberg, Mansfield, JJ.); *United States* v. *Vilhotti,* 452 F. 2d 1186, 1189 (Moore, Hays, Mulligan, JJ.); *United States* v. *Fields,* 466 F. 2d 119, 121 (Feinberg, Mulligan, Oakes, JJ.); *United States* v. *Jacobs,* 475 F. 2d 270, 282 (Friendly, Oakes, Timbers, JJ.). Moreover, since the decision below, the judges of that Circuit((including Judge Kaufman)

have continued to support the *Crimmins* rule. *United States* v. *Houle and Diodato*, 490 F. 2d 167 (Kaufman, Smith, Oakes, JJ.); *United States* v. *Cangiano*, No. 72-1120, decided January 11, 1974 (Mulligan, Oakes, Timbers, JJ.); *United States* v. *DeMarco*, 488 F. 2d 828 (Kaufman, Smith, Oakes, JJ.).

Moreover it is not true that the government "voluntarily acquiesed in, ratified and recognized the validity of the *Crimmins* doctrine * * *" (Memo. in Opp., p. 3). In its petition for rehearing the government said (Petition for Rehearing, pp. 1-2, n. *):

> The Government continues to oppose the extension of the "traffic light" doctrine of *United States* v. *Crimmins*, 123 F. 2d 271 (2d Cir. 1941) to cases in which, as here, the federal interest arises not out of some aspect of the prohibited act, but out of the identity of the object of the conspirators' criminal design.
>
> * * *
>
> However, because we believe that the consideration of this issue in [sic] a matter for the Court *in banc*, and because rehearing *in banc* is not being sought in this case, we do not ask the Court to reconsider its reversal of the conspiracy convictions.[1]

---

[1]We note that in *United States* v. *Hickman*, 487 F. 2d 1404, petition for writ of ceritorari pending, No. 73-6009, the Seventh Circuit ordered that its earlier unpublished opinion in *United States* v. *Poleski* be published (See Pet. 8, n. 8). The case is now reported at 489 F. 2d 822.

It is repectfully submitted that the United States is not estopped from asking this Court to consider the continued validity of the *Crimmins* rule.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

Supreme Court, U. S.
FILED
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No. 73-1123

In the Supreme Court of the United States

OCTOBER TERM, 1973

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RALPH FEOLA

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. Apps. A and B) are reported at 486 F.2d 1339.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1973 (Pet. App. C). On December 11, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and

including January 18, 1974. The petition was filed on that date and was granted April 15, 1974 (A. 47). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to violate a federal law, it is necessary to prove the defendant's knowledge of the jurisdictional element, when such knowledge need not be shown in a prosecution for the underlying substantive offense.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 111 provides in part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, respondent and three co-defendants were convicted of assaulting federal narcotics officers while the officers were engaged in the performance of their official duties, in violation of 18 U.S.C. 111, and of conspiring to commit that offense, in violation of 18 U.S.C. 371.[1] Respondent was sentenced to imprisonment for one to four years on the conspiracy count, to be followed by three years' probation on the substantive count; he was also fined $3,000 on the substantive count. The court below initially reversed respondent's convictions on both counts (Pet. App. A), but upon rehearing reinstated his conviction on the substantive count (Pet. App. B).[2]

---

[1] Respondent's three co-defendants were Enriquito Alsondo, Henry Rosa, and Michael Farr. Alsondo was also convicted of carrying a deadly weapon during the commission of a felony, in violation of 18 U.S.C. 924(c)(2).

[2] While the court below also reversed the conspiracy convictions of respondent's three co-defendants, we did not petition for a writ of certiorari in those cases because of the concurrent sentences involved (see Pet. 3, n. 2). Co-defendant Farr's petition to review his conviction on the substantive count is pending before the Court, *Farr* v. *United States*, No. 73-953.

1. On August 21, 1972, Jeffrey Hall, an undercover agent for the Bureau of Narcotics and Dangerous Drugs, was introduced to respondent's co-defendant Michael Farr through an informant. At that meeting, Farr agreed to provide agent Hall with a kilogram of heroin, to be supplied by respondent, for a price of $30,000 (A. 4-5). Ten days later, Hall, accompanied by undercover narcotics agent Lightcap and the informant, met Farr and Henry Rosa in front of a Manhattan apartment, where Rosa told Hall that they were prepared to sell half a kilogram of heroin for $17,000. Rosa asked to see Hall's money, and Hall showed him a "flashroll" of money. The group then proceeded to another Manhattan apartment, where respondent was purportedly waiting with the heroin. Enroute, Rosa told agent Hall that he was a bodyguard for the "big man," and was along to make sure that no guns were involved (A. 6-8, 17-19). Rosa also asked agent Lightcap if he was carrying a gun; Lightcap replied that he was not, although he did in fact have a gun in his waistband (A. 19-20).

Enriquito Alsondo admitted the group into the apartment and directed agent Hall to the bedroom where, he said, heroin was located. After handing the roll of money to agent Lightcap, agent Hall proceeded into the bedroom with Alsondo, Farr, and Rosa; he there observed an open attache case containing white powder, which Alsondo said was the heroin, but which was subsequently identified as a

form of sugar (A. 9-10, 21). Rosa and Farr then left the bedroom, and, as Alsondo was walking out of the room, agent Hall opened the door of a bedroom closet and observed a man on the floor, bound and gagged.[3] Agent Hall thereupon drew his gun and went out of the bedroom into a hallway where he observed Alsondo drawing a revolver from the back of his waistband as he approached agent Lightcap. Hall shouted a warning to Lightcap and also called out that they were federal agents. The two agents then forcibly subdued Alsondo and took the pistol from him, after which Hall handcuffed him (A. 11-12, 16, 22-23). Agent Lightcap then rushed to the living room area where he encountered Rosa, who attempted to shove Lightcap out of his way in an attempt to flee. Lightcap subdued Rosa and placed him under arrest; he then proceeded to the kitchen, where he found Farr, crouched in a corner with his hands over his head (A. 23-24). A search of the apartment revealed respondent concealed in a closet (A. 15, 25-26, 41).

At the time they arrested respondent, the agents seized an address book from him which contained the telephone numbers of Alsondo, Farr, and the Manhattan apartment in which the above described events occurred (A. 26-27, 29-37). Following his arrest, respondent told an Assistant United States Attorney that he had nothing to do with the sale of narcotics,

---

[3] The man was subsequently identified as the tenant of the apartment (A. 15).

proclaiming, "[T]he stuff you seized is sugar" (A. 28).

Respondent testified in his own behalf. He acknowledged being at the apartment at the time of these events, but denied participating in the scheme to assault or rob the narcotics agents (A. 37-41).

At the close of the evidence, the conspiracy count was submitted to the jury on the theory that an agreement among the defendants could be inferred, which encompassed a plan either to defraud the agents by selling sugar for $17,000, or to assault and rob the agents should the fraud be discovered (A. 43-44).[4] The court also charged the jury with regard to the conspiracy count and the substantive count, without objection from defense counsel, that the government did not have to prove that the defendants knew that the victims of their assault were federal officers (A. 43, 46).

2. The court of appeals reversed the conviction on the conspiracy count on grounds not urged by respondent. It ruled that although knowledge that the victim of an assault is a federal officer was not essential for conviction of a substantive charge under 18 U.S.C. 111, such knowledge was required to support a conviction for conspiring to assault a federal officer. In reaching that conclusion, the court followed the 1941 opinion of Judge Learned Hand in *United States* v. *Crimmins*, 123 F.2d 271, in which

[4] The court instructed the jury that a conspiracy to *rob* the agents would also include a conspiracy to assault, since assault is an element of robbery (A. 43).

the Second Circuit had held that even though a defendant could be guilty of causing the interstate transportation of stolen securities without knowledge of their interstate transportation, such knowledge was required to support a conviction for *conspiring* to transport stolen securities in interstate commerce. The court recognized that *Crimmins* has been an object of criticism (Pet. App. 22), but "somewhat reluctantly" accepted it as "controlling precedent" (Pet. App. 24).[5]

SUMMARY OF ARGUMENT

There should be no difference in the quantum of knowledge required to establish perpetration of a substantive offense and to show a conspiracy. Thus

[5] In its first opinion, the court below also reversed respondent's substantive conviction under Section 111. Because respondent had not personally participated in the assault upon the agents, the court reasoned that his liability rested solely upon the principle that a conspirator is liable for the acts of his co-conspirators done in furtherance of the illicit plan. See *Pinkerton* v. *United States*, 328 U.S. 640, 647. A "*Pinkerton* instruction" had been given the jury. Since the court deemed the conspiracy conviction to be invalid, it held that the substantive conviction based upon the conspiracy charge similarly had to fall (Pet. App. 26). On reconsideration of this issue on rehearing, the substantive assault conviction of respondent was affirmed (Pet. App. B). The court noted in its second opinion that although respondent could not be guilty of a federal conspiracy to assault federal officers, he was nonetheless guilty as a joint criminal venturer of assaulting certain individuals, and thus, being legally responsible for the acts of his co-venturers, he was guilty of the substantive assault upon federal officers, which requires no specific knowledge of the victims' status.

when knowledge of a federal jurisdictional element need not be shown in a prosecution for a substantive offense, neither should such knowledge be required to make out a conspiracy to commit that offense.

The federal courts of appeals have uniformly recognized that, in a prosecution for assaulting a federal officer under 18 U.S.C. 111, the prosecution is not required to prove that the defendant knew that his victim was a federal officer. These holdings are consistent with decisions under numerous other federal statutes holding that, when the statute is silent as to whether a defendant need know a federal jurisdictional element, proof of such knowledge is not required.

Since the underlying statute involved here does not require a showing of knowledge of the victim's federal status, such knowledge should not be required to establish a conspiracy to commit that offense. The notion that such knowledge is required stems from the 1941 decision in *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2). There Judge Learned Hand ruled that, in a prosecution for conspiracy to transport stolen bonds in interstate commerce, knowledge of the interstate transportation must be shown, even though such knowledge might not be required in a prosecution for the underlying substantive offense. Judge Hand rested his conclusion on his now famous traffic light analogy, which we set out below (*infra*, p. 17). As we demonstrate, that analogy fails because it substitutes for ignorance of the federal jurisdictional element (which is all that was unknown to

Crimmins), ignorance of the very object of the conspiracy (in his analogy, ignorance of the existence of a traffic light).

That knowledge of a federal jurisdictional element is not required in a conspiracy prosecution is established by *United States* v. *Freed*, 401 U.S. 601, in which this Court upheld an indictment for conspiracy to possess unregistered hand grenades which did not allege knowledge of the federal registration requirements.

In fact, requiring knowledge of a jurisdictional element is inconsistent with this Court's view of the law of conspiracy. As the Court said in *Blumenthal* v. *United States*, 332 U.S. 539, 557, a conspiracy may be proved by showing an understanding of the general plan, "without requiring evidence of knowledge of all its details * * *."

The conclusion that knowledge of a jurisdictional element is not required is buttressed by decisions under other federal statutes which have held that, if such knowledge is not required to prove a substantive offense, it need not be shown in a conspiracy prosecution.

ARGUMENT

IN A PROSECUTION FOR CONSPIRACY TO VIOLATE A FEDERAL LAW, IT IS NOT NECESSARY TO PROVE A DEFENDANT'S KNOWLEDGE OF THE FEDERAL JURISDICTIONAL ELEMENT WHEN SUCH KNOWLEDGE NEED NOT BE SHOWN IN A PROSECUTION FOR THE UNDERLYING SUBSTANTIVE OFFENSE.

1. Our basic submission is that there should be symmetry between the law governing proof of sub-

stantive offenses and the law of conspiracy. Whatever state of knowledge must be proved to establish perpetration of the substantive offense, proof of the same state of knowledge, together with proof of an agreement to do acts constituting the substantive offense and an overt act in furtherance of that agreement, should suffice in a conspiracy prosecution. Thus, when knowledge of a federal jurisdictional element need not be shown in a prosecution for a substantive offense, neither should proof of such knowledge be required in a prosecution for conspiracy to commit that offense. The Ninth Circuit put the point well in *United States* v. *Roselli*, 432 F. 2d 879, 891-892:

> The essence of the offense under the general conspiracy statute, 18 U.S.C. § 371, is an agreement by two or more persons to commit the substantive crime. In virtually all cases the meeting of minds is established simply by inference from a concert of action that produces the forbidden result. There is no apparent reason for requiring not only proof of a concert of action that includes all elements of the substantive offense, but also proof of knowledge of the jurisdictional element that is not required for conviction of the substantive offense. Such knowledge is as irrelevant to the purposes of the general conspiracy statute as it is to the purposes of the substantive statutes. [Footnote omitted.]

The federal courts of appeals have uniformly recognized that, in a prosecution for assaulting a federal officer under 18 U.S.C. 111, the government is not required to prove that the defendant knew that the victim of his assault was a federal officer. See *United States* v. *Perkins*, 488 F. 2d 652 (C.A. 1);[6] *United States* v. *Ulan*, 421 F. 2d 787 (C.A. 2); *United States* v. *Goodwin*, 440 F. 2d 1152 (C.A. 3); *United States* v. *Wallace*, 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Young*, 464 F. 2d 160 (C.A. 5); *United States* v. *Kiraly*, 445 F. 2d 291 (C.A. 6), certiorari denied, 404 U.S. 915; *United States* v. *Ganter*, 436 F. 2d 364 (C.A. 7); *United States* v. *Leach*, 429 F. 2d 956 (C.A. 8) (dictum), certiorari denied, 402 U.S. 986; *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9).[7]

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[6] As pointed out in *Perkins*, there are situations in which the defendant's lack of knowledge of a federal official's status may be relevant, such as when the defendant believes that he is acting in lawful defense of his person or property and in so doing commits one of the acts enumerated in 18 U.S.C. 111. However, such a person's acts are not motivated by a criminal intent and are therefore clearly distinguishable from respondent's acts. Respondent, of course, did not claim justifiable self-defense.

[7] The conclusion that Section 111 does not require a showing of knowledge of the victim's official status is amply supported by the statute's wording, its manifest purpose, and its legislative history. As to the wording, the Second Circuit observed in *United States* v. *Lombardozzi*, 335 F. 2d 414, 416, certiorari denied, 379 U.S. 914:

> Many statutes creating crimes contain such requirements as "knowingly," "with knowledge," "intentionally," and "with intent." No such prerequisite has been written by Congress into section 111 although it could easily have made knowledge an essential ingredient. * * * The courts should not by judicial legislation change the stat-

ute by adding, in effect, the words "with knowledge that such person is a federal officer."

See also *Bennett* v. *United States*, 285 F. 2d 567 (C.A. 5), certiorari denied, 366 U.S. 911; *McNabb* v. *United States*, 123 F. 2d 848, 855 (C.A. 6), reversed on other grounds, 318 U.S. 332, certiorari denied after retrial, 323 U.S. 771.

Courts have further seen the elimination of the requirement of knowledge of the victim's status as consistent with the statute's underlying purpose, which is merely to provide a federal forum for the prosecution of assaults when they are made on federal officers. As the court observed in *Kartman*, *supra*, 417 F. 2d at 895:

> This interpretation of the forcible assault prohibition in section 111 as requiring only mens rea, and not also specific knowledge of the victim's official status, comports with the legislative purpose, which was simply to provide a federal forum when the enumerated offenses were committed against federal officers engaged in the performance of federal duties.

See also *United States* v. *Lombardozzi*, *supra*, 335 F. 2d at 416; *United States* v. *Goodwin*, *supra*, 440 F. 2d at 1155. But see *United States* v. *Fernandez*, C.A. 9, No. 72-2088, decided May 13, 1974 (Hufstedler, J., concurring), petition for writ of certiorari pending, No. 73-6868.

This view of the statute's purpose is confirmed by the central item of legislative history of the predecessor of 18 U.S.C. 111, a letter dated January 3, 1934, from Attorney General Cummings to the Chairman of the Senate Committee on the Judiciary. In that letter the Attorney General pointed out that "[t]he Federal Government should not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel * * *." S. Rep. No. 535, 73d Cong., 2d Sess., p. 2. See also H. Rep. No. 1455, 73d Cong., 2d Sess.; 78 Cong. Rec. 8126-8127.

Finally, the conclusion that knowledge of the victim's federal status is not required under Section 111 is supported by the *Final Report of The National Commission on Reform of Federal Criminal Laws* (1971). Sections 1611 and 1612 encompass the offenses of simple assault and aggravated assault,

These rulings are consistent with similar rulings with respect to numerous other federal statutes. As in this case, the courts of appeals have uniformly held that where the statute in question is silent as to the requirement of a defendant's knowledge of a jurisdictional element, proof of such knowledge is not an element of the government's case in a prosecution of the substantive offense.[8] In a case involving a

and the fact that the victim is a federal officer is simply the "jurisdictional basis" which confers federal jurisdiction over the crime. See Sections 201(c), 1611(3), and 1612(2) of the *Final Report*. Section 204 of the *Final Report* specifically states that a defendant's knowledge of such "jurisdictional basis" is not required for prosecution under federal statutes, unless specifically provided in the statutes.

[8] The following are examples of such prosecutions arising under statutes requiring the presence of an interstate commerce or federal property nexus:

> 18 U.S.C. 2312 (interstate transportation of a stolen vehicle knowing it to be stolen): Knowledge by a defendant that he crossed state lines is not necessary. *Bibbins* v. *United States*, 400 F.2d 544 (C.A. 9).
>
> 18 U.S.C. 2313 (receiving stolen vehicle moving in interstate commerce knowing it to have been stolen): Proof of knowledge that the vehicle has moved across state lines is not necessary. *Overton* v. *United States*, 405 F. 2d 168 (C.A. 5); *Pilgrim* v. *United States*, 266 F. 2d 486 (C.A. 5); *Brubaker* v. *United States*, 183 F. 2d 894 (C.A. 6); *United States* v. *Hamilton*, 456 F. 2d 171 (C.A. 3), certiorari denied, 406 U.S. 947.
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> 18 U.S.C. 2314 (interstate transportation of stolen goods knowing them to be stolen): Knowledge that the goods crossed state lines is unnecessary. *United States* v. *Kierschke*, 315 F. 2d 315 (C.A. 6); *United States* v. *White*, 451 F. 2d 559 (C.A. 6), certiorari denied, 405 U.S. 1071; *United States* v. *Mingoia*, 424 F. 2d 710 (C.A. 2);

United States v. *Strauss*, 443 F. 2d 986 (C.A. 1), certiorari denied, 404 U.S. 851; *United States* v. *Masters*, 456 F. 2d 1060 (C.A. 9); see *United States* v. *Tannuzzo*, 174 F. 2d 177 (C.A. 2), certiorari denied, 338 U.S. 815 (predecessor statute).

18 U.S.C. 2315 (receiving goods moving as part of interstate commerce knowing them to be stolen): Knowledge that the goods were moving in interstate commerce is unnecessary. *Pugliano* v. *United States*, 348 F. 2d 902 (C.A. 1), certiorari denied, 382 U.S. 939; *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *Corey* v. *United States*, 305 F. 2d 232 (C.A. 9), certiorari denied, 371 U.S. 956.

18 U.S.C. 2113(c) (receiving money taken from a federally insured bank): Knowledge that the money was from a federally insured bank is unnecessary. *Nelson* v. *United States*, 415 F. 2d 483 (C.A. 5), certiorari denied, 396 U.S. 1060.

18 U.S.C. 641 (theft and receipt of property of the United States): Knowledge that property knowingly converted belongs to the government is unnecessary. *United States* v. *Howey*, 427 F. 2d 1017 (C.A. 9); *United States* v. *Boyd*, 446 F. 2d 1267, 1274 (C.A. 5); cf. *Findley* v. *United States*, 362 F. 2d 921 (C.A. 10).

18 U.S.C. 659 (possession or receipt of goods stolen from an interstate shipment): Knowledge that goods were stolen specifically from interstate shipment is unnecessary. *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *United States* v. *Vilhotti*, 452 F. 2d 1186 (C.A. 2), certiorari denied, 406 U.S. 947.

18 U.S.C. 1952 (travel in or use of facilities of interstate commerce to facilitate an unlawful activity): Knowledge that interstate facilities were used is unnecessary. *United States* v. *Bash*, 258 F. Supp. 807 (N.D. Ind.), affirmed *sub nom. United States* v. *Miller*, 379 F. 2d 483, 487 (C.A. 7), certiorari denied, 389 U.S. 930; *United States* v. *Roselli*, 432 F. 2d 879 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F. 2d 101 (C.A. 8), certiorari denied, 402 U.S. 952.

prosecution for use of an interstate wire to execute a fraudulent scheme in violation of 18 U.S.C. 1343, the Second Circuit stated the reasoning that is generally followed concerning a defendant's knowledge of the federal jurisdictional element:

> The statute does not condition guilt upon knowledge that interstate communication is used. The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the crime is the fraudulent scheme itself. Nothing is added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme. There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used. If the wire employed is an interstate wire the requirements for federal jurisdiction are satisfied. It is wholly irrelevant to any purpose of the statute that the perpetrator of the fraud knows about the use of interstate communication. [*United States* v. *Blassingame*, 427 F.2d 329, 330, certiorari denied, 402 U.S. 945.]

In short, the essence of the acts prohibited by the various statutes lies in the elements of robbery, theft, knowing possession of stolen property, etc.; nothing is added to the defendant's criminality by the mere fact that an act is involved which brings the crime within the jurisdiction of the federal government.

Since the underlying statute involved in the instant case, 18 U.S.C. 111, does not require a showing of knowledge of the victim's federal status, such knowledge should not, under the logically sound principle of symmetry, be required to establish a conspiracy to violate Section 111 by assaulting individuals who in fact are federal officers engaged in the performance of their duties.

2. The court of appeals recognized that the government need not prove, in a prosecution under 18 U.S.C. 111, that the defendant *knew* the victim of the assault to be a federal officer. Nevertheless the court held that such knowledge must be shown in a prosecution under 18 U.S.C. 371 for conspiracy to violate Section 111. The court reached this anomalous conclusion because it accepted *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2), as "controlling precedent" (Pet. App. 24).

Crimmins was a prosecution for conspiracy to transport stolen securities in interstate commerce under the predecessor statute to 18 U.S.C. 2314. Crimmins, a lawyer in Syracuse, received and disposed of stolen bonds from a confederate in New York City. The evidence showed that "some of * * * [the bonds] were stolen in other states [than New York]" and that Crimmins knew the bonds were stolen and had agreed to and did receive them (123 F. 2d at 272). However, the proof did not show that Crimmins "knew the place of any of the thefts" (*ibid.*). While Judge Learned Hand assumed that the evidence would support a conviction of the underlying substantive offense,[9] he nevertheless ruled that the *conspiracy* prosecution of Crimmins must fail because the evidence did not show that he *knew* of the bonds' interstate transportation.[10]

Judge Hand supported his conclusion principally by reference to the now famous "traffic light" analogy (123 F. 2d at 273):

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.

Judge Hand argued that this analogy showed that to allow a conviction without proof of the conspirator's knowledge of the jurisdictional element would enlarge the scope of the conspiracy "beyond the reasonable intendment of the common understanding" of the conspirators. *Id.* at 273.

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[9] Courts have since held that proof of knowledge of the interstate transportation is not necessary. See note 8, *supra*.

[10] The rule espoused by the Second Circuit in this case has drawn criticism from commentators. See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 937-939 (1959); *National Commission on Reform of Federal Criminal Laws, Working Papers* 388-389 (1970). Likewise, the *Final Report of the National Commission on Reform of Federal Criminal Laws* (1971) has explicitly disavowed the notion that a conspirator must have knowledge of the jurisdictional element of an offense. See Sections 203, 204, and 1004 of the *Final Report*. See also A.L.I., *Model Penal Code*, Sec. 5.03, Comment at 112 (Tentative Draft No. 10, 1960) for a similar view.

The traffic light analogy in *Crimmins* is inapposite and misleading. It merely proves the impossibility of a conspiracy without an object, which is to say, that men cannot reach an agreement with no subject matter to agree about. That tautology fails to demonstrate that men may not conspire when they have an object in mind but are unaware of a fact necessary to give a particular court jurisdiction over their crime. In the present case, respondent conspired to assault particular men. The conspiracy had, therefore, a definite object. Moreover, the act agreed upon was obviously criminal. The only thing respondent did not know was that the men were federal officers so that the crime would be charged under a certain federal law rather than under state law.

The fallacy of the *Crimmins* traffic-light analogy in this context may be seen by recasting it to state ignorance of a jurisdictional element, which is all that is involved here, rather than ignorance of the object of the conspiracy. Thus:

> While one may be guilty of a federal offense for running past a traffic light on a federal reservation in ignorance of the fact that it stands on federal land, one cannot be guilty of a federal offense for conspiring to run past the light unless one supposes it to be on a federal reservation.

This substitution of ignorance of a jurisdictional element for ignorance of the object of the crime or conspiracy shows that the *Crimmins* analogy is inapplicable here. Applied to a jurisdictional element, the formulation makes no sense. When the object and

the criminality of both the act and the conspiracy are known, advance knowledge of which code provision applies and which government will apply the sanction are irrelevant.[11]

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[11] Another way of analyzing the vice of Judge Hand's analogy is to note that it is predicated upon a strict liability offense, whereas neither the crime being considered in *Crimmins* nor the assault here is that kind of offense. Strict liability offenses may, in fact, represent a singular exception to the general principle for which we here contend of symmetry between the knowledge requirements for substantive offenses and for related conspiracy charges (in part, as indicated in the text, because of the impossibility of postulating the conspiratorial agreement without an object). They do not, however, provide a meaningful analogy for consideration of conspiracies to commit other types of offenses.

In the case of strict liability offenses (*e.g.*, certain traffic violations, manufacture of adulterated or misbranded drugs), the law makes individuals engaged in certain hazardous occupations (*e.g.*, driving, drug manufacturing) do so at their own peril and permits imposition of criminal sanctions upon those who violate the law's standards, even if they are wholly ignorant of the duty imposed by the law or of the operative facts. See, *e.g.*, *United States* v. *Dotterweich*, 320 U.S. 277; see also Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933). In such circumstances, the actual performance of the prohibited act is thought to be of such harm to society as to warrant punishment regardless of the actor's state of knowledge. Where, however, there is merely an unfulfilled agreement to do an act (*e.g.*, driving a car or manufacturing drugs), there is no assurance that a crime will actually occur. For a crime to occur, some subsequent intervening event must take place: *e.g.*, the car must turn out to be unlicensed or the drugs adulterated. In the context of strict liability offenses, then, the agreement to do an act that later turns out to be unlawful may itself be entirely innocent.

But the crimes involved in *Crimmins* and in this case were not of a strict liability character. They were the common offenses of receiving stolen property and assault. *Mens rea*, the criminal intent, was shown when it was proved that

In short, the traffic light analogy simply does not support the holding that a conspiracy must include *knowledge* (as distinguished from factual existence) of every element of the substantive crime, even though such knowledge is not required for commission of the substantive crime itself. In fact, this Court has rejected that principle in *United States* v. *Freed*, 401 U.S. 601, 607-610. In *Freed* the defendants were charged with possession and conspiracy to possess hand grenades that had not been registered in the National Firearms Registration and Transfer Record as required by 26 U.S.C. 5861(d). The district court dismissed the indictment for failure to allege that the defendants knew that the hand grenades were in fact unregistered. This Court reversed, holding that knowledge that the hand grenades were unregistered (as distinct from proof that they were in fact unregistered) was not an element of the substantive offense or of the conspiracy to commit it. The requisite knowledge for the substantive offense and the conspiracy were held to be the same.

Interestingly, *Freed* dealt with a strict liability statute, "a regulatory measure in the interest of the public safety" (401 U.S. at 609), which is the home ground of Judge Hand's traffic light analogy (see

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Crimmins *knew* the bonds were stolen and that respondent and his co-defendants *intentionally* assaulted their victims. When crimes of this sort are substituted in Judge Hand's analogy, it becomes meaningless, because one cannot deal in stolen property "of whose existence one is ignorant" or commit an assault unknowingly.

note 11, *supra*). And even in the context of such a statute, the Court unanimously upheld the propriety of punishment for an agreement to do an act without proof that the defendant knew the act was prohibited. Thus, even in context of certain kinds of strict liability statutes, *Freed* establishes that the *Crimmins* analysis of conspiracy law is erroneous.

The Court in *Freed* doubted, however, that one could possess hand grenades without knowing that it was wrongful, even if one did not know of the existence of the federal jurisdictional element (in that case, the federal registration requirement). The Court said (401 U.S. at 609, n. 14):

> We need not decide whether a criminal conspiracy to do an act "innocent in itself" and not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy. An agreement to acquire hand grenades is hardly an agreement innocent in itself. Therefore what we have said of the substantive offense satisfies on these special facts the requirements for a conspiracy. * * *

So here, an agreement to commit an assault "is hardly an agreement innocent in itself," even if the conspirators did not know that the intended victims were federal officers. Therefore, proof of the elements "of the substantive offense satisfies * * * the requirements for a conspiracy."

3. The basic holding of *Crimmins* and cases that have followed its lead is that exclusion of the juris-

dictional element from the requirement of knowledge results in an expansion of the scope of the illicit agreement beyond the terms the conspirators had envisioned (see *Crimmins*, *supra*, 123 F. 2d at 273). But this conclusion is contrary to the law of conspiracy as it has developed in this Court. In *Blumenthal* v. *United States*, 332 U.S. 539, 557, the Court noted that a conviction for a conspiracy may rest solely upon a showing of understanding of the general plan, "without requiring evidence of knowledge of all its details or of the participation of others." In upholding a conviction for conspiring to restrain interstate trade and commerce, this Court stated in *United States* v. *Patten*, 226 U.S. 525, 543:

> And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for * * * by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.

The proof in this case established that respondent was a member of a conspiratorial agreement to assault or rob certain persons in order to obtain $17,000. He intentionally adopted a course of conduct designed to bring about that result. In so doing, he intentionally violated the law "in the only sense in which the law ever considers intent." *Ellis* v. *United States*, 206 U.S. 246, 257. This intent to engage in a specific course of unlawful conduct, embodied in

an agreement between conspirators and furthered by some overt act, constitutes all of the elements of the common law crime of conspiracy, codified in 18 U.S.C. 371.[12] It misconceives the nature of a conspiratorial agreement to say that a failure to require a showing of knowledge of a jurisdictional element expands the scope of the conspiratorial agreement, because the jurisdictional element does not enhance the criminality of the agreement and is logically no part of the crime itself. *United States* v. *Bolin*, 423 F.2d 834, 836-837 (C.A. 9), certiorari denied, 398 U.S. 954.

Even in *Crimmins* it was suggested that, under circumstances in which conspirators exhibit a "continued indifference" to whether their criminal conduct encompasses the federal jurisdictional element (in that case, whether the stolen bonds had crossed state lines), knowledge of that element may be deemed an "implied term" of the agreement (123 F.2d at 273). This suggestion has been followed in numerous lower court decisions. See *United States* v. *Iacovetti*, 466 F.2d 1147, 1154 (C.A. 5), certiorari denied, 410 U.S. 908; *United States* v. *Garafola*, 471 F.2d 291 (C.A. 6); *United States* v. *Thompson*, 476 F.2d 1196, 1198-1200 (C.A. 7), certiorari denied, 414 U.S. 918; *Nassif* v. *United States*, 370 F.2d 147, 152-153

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[12] The text of the conspiracy statute itself ("If two or more persons conspire * * * to commit any offense against the United States * * *") sheds little light on the question whether the courts should import a requirement of proof of the conspirators' knowledge of the jurisdictional element. Certainly the statute itself contains no such requirement.

(C.A. 8). In *Nassif*, the Eighth Circuit drew this analogy (370 F.2d at 153, n. 9):

> If one agrees to drive through a downtown section of a city at 60 m.p.h. without stopping, one could be guilty of conspiring to run past a traffic light, even though ignorant of such light, because one could reasonably suppose that there is such a light to run past.

In essence, if one agrees to drive recklessly and lawlessly through town, one assumes the risk that one of the traffic lights may be red. Respondent and his co-conspirators exhibited a similar kind of lawlessness and recklessness when they decided to "rip off" the intended purchasers of narcotics. It is not too much to say that they assumed the risk that their victims might turn out to be federal officers.

4. With the exception of the opinion of the Second Circuit in this case, it appears that no lower court has ever faced the *Crimmins* issue in the specific context of a prosecution for conspiracy to violate 18 U.S.C. 111. However, our position that no distinction should exist in the knowledge requirements for conspiracy and for the underlying offense is supported by decisions of this Court and courts of appeals in cases involving the same issue with respect to other federal statutes.

In re Coy, 127 U.S. 731, was a case in which the defendants were charged, under federal law, with conspiring to tamper with election returns in an election involving both state and federal officials. The defendants argued that "as it is consistent with

the indictment that the actions of the conspirators were directed only to the election of * * * [state and local officers], and not to that for the federal office of a congressional representative, the indictment is for that reason insufficient." 127 U.S. at 753. In rejecting this argument, Mr. Justice Miller stated (127 U.S. at 753-754):

> The charge is that the conspirators *unlawfully and feloniously* induced the election officers to omit to perform their duty in this respect, which is in general conceded to be expressive of an evil intent. But counsel demand something more than this general evil intent in tampering with the poll lists, tally papers and certificates, although it is not denied that the object of the parties accused, in inducing the election officers to violate their duty, proceeded from a criminal intent, or that it was done for the purpose of affecting the returns contained in the papers that were withheld, or exposing them to the danger of mutilation and alteration. It is said, however, that since the evil intent is not shown to have been specifically aimed at the returns of the vote for congressmen, the statutes of the United States can have no force so far as the infliction of any penalty is concerned; and it is asserted that Congress had no power to provide for any punishment where no intent affecting the congressional election is averred.
>
> It would be a very singular principle to establish, that, where a man was charged with a homicide, caused by maliciously shooting into a crowd with the purpose of killing some person against whom he bore malice, but with no in-

> tent to injure or kill the individual who was actually struck by the shot, he should be held excused because he did not intend to kill that particular person, and had no malice against him.
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> * * * * *
>
> The object to be attained by these acts of Congress is to guard against the danger, and the opportunity, of tampering with the election returns, as well as against direct and intentional frauds upon the vote for members of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result. [Emphasis in original.]

The Court in *Coy* thus laid down two principles that we rely upon here: (1) where there is an intent to commit an unlawful act, there need not be a showing of a specific "anti-federal" intent unless the statute requires it; and (2) concerted action on the part of the conspirators that encompasses all of the elements necessary to prove the underlying substantive offense is sufficient to prove the conspiracy.

This view has been particularized by the courts of appeals. Thus, for example, in *Wilkerson* v. *United States*, 41 F. 2d 654, certiorari denied, 282 U.S. 894, the Seventh Circuit reviewed a conviction for

conspiracy to receive stolen automobiles that were moving as interstate commerce, in violation of 18 U.S.C. (1940 ed.) 408 (now 18 U.S.C. 2313). After noting that the statute defining the substantive offense did not require that the defendant know that the stolen property was a part of interstate commerce, the court concluded (41 F. 2d at 656):

> The conspiracy statute under which this indictment is drawn provides that if two or more persons conspire to commit *any offense* against the United States and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined or imprisoned, etc. How, then, can it be said that it is necessary, under the conspiracy statute, to prove knowledge of the appellant as to the interstate character of the property, when it is not necessary to do so in order to warrant a conviction under the statute which defines the substantive crime? [Emphasis in original.] [13]

In *Nelson* v. *United States*, *supra*, 415 F.2d 483, certiorari denied, 396 U.S. 1060, the Fifth Circuit utilized the same reasoning in upholding a conviction for conspiring to violate 18 U.S.C. 2113(c) (receiv-

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[13] Although the court in *Wilkerson* found that the resolution of that issue was not required for the disposition of the case, the Seventh Circuit has since expressly held that proof of a defendant's knowledge of a "jurisdictional element" is not required in a conspiracy prosecution. *United States* v. *Polesti*, 489 F. 2d 822, 824 (C.A. 7), petition for a writ of certiorari pending, No. 73-5489.

ing property, knowing it to have been stolen from a federally insured bank).[14]

CONCLUSION

Under traditional concepts of the common law crime of conspiracy, an agreement that encompasses all of the elements necessary for prosecution of the underlying substantive offense thereby also possesses the requisite attributes of a conspiracy in violation of the general federal conspiracy statute, 18 U.S.C. 371, including the element of criminal intent. In adopting and perpetuating a contrary rule, the Second Circuit in *Crimmins* and in its decision in this case was misled by a seductive, but faulty, analogy into requiring a different and greater showing of knowledge in a conspiracy case than in a prosecution of the underlying substantive offense. There is no basis in law or reason for this distinction, and the *Crimmins* doctrine should be rejected. Accordingly, the judgment of the court of appeals in this case should be reversed.

[14] *Pettibone* v. *United States*, 148 U.S. 197, does not support a contrary conclusion. There, defendants were indicted for conspiring to intimidate employees of a certain company into striking while a federal court injunction was in effect prohibiting such action on their part. The indictment did not allege that the defendants had knowledge of the injunction, nor that it was the purpose of the conspiracy to violate the injunction. *Id.* at 203-204. From that set of facts, the Court concluded that the defendants could not be convicted of conspiring to violate a federal law prohibiting the obstruction of justice since it did not appear that they knew or had notice that "justice was being administered in such court." *Id.* at 206. An important aspect of this case, which supports our position, is that the Court first looked to determine what constituted the *substantive* offense of obstruction of justice. Having determined that the indictment failed to show that defendants' actions were a violation of the substantive offense, it logically followed that they could not be guilty of conspiring to commit such an offense.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1123

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH FEOLA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the court of appeals (Pet. Apps. A and B) are reported at 486 F.2d 1339.

QUESTION PRESENTED

Whether proof of scienter is necessary to convict respondent of conspiracy to violate 18 U.S.C. Section 111.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 111 provides in part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, respondent and three co-defendants were convicted of assaulting federal narcotics officers while the officers were engaged in the performance of their official duties, in violation of 18 U.S.C. 111, and of conspiring to commit that offense, in violation of 18 U.S.C. 371. Respondent was

sentenced to imprisonment for one to four years on the conspiracy count, to be followed by three years' probation on the substantive count; he was also fined $3,000 on the substantive count. The court below initially reversed respondent's convictions on both counts (Pet. App. A), but upon rehearing reinstated his conviction on the substantive count (Pet. App. B).

1. The basic case presented by the Government revolved around the testimony of Jeffrey Hall and Irwin Lightcap, both Special Agents with the U.S. Department of Justice, Bureau of Narcotics and Dangerous Drugs.

Agent Hall's testimony was that on August 21, 1972 he was introduced to one, MICHAEL FARR, who was respondent's co-defendant, by an informant and that he, Agent Hall, had a conversation with Farr regarding a drug transaction. (A, 4-5)

At this meeting on August 21, 1972 Agent Hall testified that Farr told him that the respondent, FEOLA, was Farr's connection for drugs. (A. 4-5)

Agent Hall testified further that he, Special Agent Lightcap and the informant, met with Farr in New York City ten days later on August 31, 1972 and that Farr was with the respondent, ROSA.

At this time, Agent Hall had with him a "flashroll" of $17,000 which was shown to the respondent, ROSA, and which was to be used to purchase a half kilo of pure heroin from Rosa and Farr's people. (A. 6-8)

The two agents, Farr, the respondent, ROSA, and the informant then drove to an apartment at 155 West 68th Street in the Borough of Manhattan where the alleged drug transaction was to take place.

Upon arriving at the apartment on the West Side the defendant, Farr, told Agents Hall and Lightcap that they were "finally going to get to meet Ralph." (A. 9) Subsequently, Agents Hall and Lightcap, the informant, Farr and the respondent, ROSA, were led into apartment No. 405, 155 West 68th Street and were let in by the respondent, ALSONDO. While Agent Lightcap remained in the front hall of the apartment, Agent Hall was led into a rear bedroom and entered said bedroom with Farr, Rosa, Alsondo and the informant. There on a bed Agent Hall observed an attache case which contained four (4) bags of white powder. (A. 9-10) Farr and Rosa left the bedroom while Alsondo, Agent Hall and the informant remained. A few seconds later, Alsondo walked out of the bedroom towards the front of the apartment. At this point in time, Agent Hall opened a closet in the bedroom and observed a man therein, later identified as the lessee of the apartment, tied and gagged. (A. 11) Agent Hall then drew his gun and walked out of the bedroom and on doing so he observed the respondent, ALSONDO, going towards Agent Lightcap, who was holding the flashroll of money, and Alsondo was reaching in his waistband in the middle of his back. Agent Hall testified that Alsondo was pulling a gun from his waistband. (A. 11)

Agent Hall shouted to Lightcap words to the effect that Alsondo had a gun, yelled "Federal Agents" and then disarmed Alsondo with the help of Agent Lightcap, in an ensuing struggle. (A. 11)

Subsequently, Farr, the respondents, ROSA and ALSONDO, were subdued, placed under arrest and the apartment was secured by Agents Hall, Lightcap and

other agents attached to the Bureau of Narcotics of Dangerous Drugs. (A. 15)

The respondent, FEOLA, was found in a closet in the front hall of the apartment three or four minutes after backup agents arrived in the apartment. (A. 41)

On September 1, 1972 at about 12:30 P.M., approximately 20 hours after his arrest, the respondent, FEOLA, gave what was characterized as a false exculpatory statement to an Assistant U.S. Attorney. Said statement was to the affect that he, FEOLA, had never been to the apartment before August 31, 1972 and that he knew none of the defendants who were arrested with him in said apartment. (A. 28)

Proof was offered by the Government to the effect that Feola indeed knew all of the defendants and he had been to the apartment before. (A. 29-32, 36)

Agent Lightcap testified that while standing with the flashroll in the front hall of the apartment Alsondo walked towards him and was reaching behind his back. Agent Lightcap observed Agent Hall with a gun in hand approaching Alsondo and yelling to Lightcap that Alsondo had a gun. (A. 22)

At the close of the evidence, the conspiracy count was submitted to the jury on the theory that an agreement among the defendants could be inferred, which encompassed a plan either to defraud the agents by selling sugar for $17,000, or to assault and rob the agents should the fraud be discovered (A. 43-44) The court also charged the jury with regard to the conspiracy count and the substantive count, without objection from defense counsel, that the government did not have to prove that the defendants knew that the victims of their assault were federal officers (A. 43, 46)

2. The court of appeals reversed the conviction on the conspiracy count. It ruled that although knowledge that the victim of an assault is a federal officer was not essential for conviction of a substantive charge under 18 U.S.C. 111, such knowledge was required to support a conviction for conspiring to assault a federal officer. In reaching that conclusion, the court followed the 1941 opinion of Judge Learned Hand in *United States v. Crimmins*, 123 F.2d 271, in which the Second Circuit had held that even though a defendant could be guilty of causing the interstate transportation of stolen securities without knowledge of their interstate transportation, such knowledge was required to support a conviction for conspiring to transport stolen securities in interstate commerce.

SUMMARY OF ARGUMENT

To obtain a conviction for conspiracy to violate 18 U.S.C. Section 111 the Government must prove scienter on the part of the actors.

There is no question that federal courts of appeals have uniformly recognized that scienter is not necessary in a prosecution for assaulting a federal officer. See *U.S. v. Ulan*, 421 F.2d 787 (A.A. 2) *U.S. v. Lombordozzi*, 335 F.2d 414, cert. denied 379 U.S. 914 and other cases cited in the Government's Brief.

The elimination of the requirement of knowledge in Section 111 serves to protect federal officers and also to provide a federal forum for a violation of Section 111.

As stated in *U.S. v. Perkins*, 488 F.2d 652, 654 (C.A. 1):

> As this court has recently stated, the legislative purpose behind Section 111 is 'to provide federal officers the protection of the federal courts while they are performing their duties. Burdening the Government with an obligation to prove knowledge can seriously impede this purpose'. Citing *U.S. v. Longone*, 445 F.2d 636, 637 (1st Cir.) cert. denied, 404 U.S. 915.

It is respectfully submitted to this learned court that a different rule must apply to a conspiracy to assault federal officers.

ARGUMENT

IN A PROSECUTION FOR CONSPIRACY TO VIOLATE 18 U.S.C. SECTION 111, IT IS NECESSARY TO PROVE THE DEFENDANT'S KNOWLEDGE OF THE FEDERAL JURISDICTIONAL ELEMENT EVEN WHEN SUCH KNOWLEDGE NEED NOT BE SHOWN IN A PROSECUTION FOR THE UNDERLYING SUBSTANTIVE OFFENSE.

1. It is respectfully submitted to this learned court that the logical approach to the issue raised in the instant case is that rule of law enunciated in *U.S. v. Crimmins*, 123 F.2d 271 (2nd Cir. 1941) and followed in numerous cases.

A conspiracy involves an agreement to perform the offense or criminal act, and accordingly, involves a meeting of the minds of the actors. Applying simple logic to the instant case, it is submitted that in order

for the respondent to be convicted of the conspiracy to assault as distinguished from the substantive act of assault he must have: a) agreed to; b) assault; c) a federal narcotics agent. Such an agreement requires specific knowledge of the identity of the victim of the assault.

It can be argued that in a prosecution involving the interstate transportation of stolen goods and similar type crimes that knowledge of the federal element can be inferred from the scope of the acts performed and from the duration of the agreement to perform the substantive acts. In such cases, the *Crimmins* rationale has been followed. See *U.S. v. Vilhotti*, 452 F.2d 1186 (2nd Cir. 1971) cert. denied 406 U.S. 947 (1972), *U.S. v. Jacobs*, 475 F.2d 270 (2nd Cir. 1973). In a case such as the instant one, which involves a single act performed spontaneously and of short duration, the *Crimmins* rationale must be followed. Such an act as an assault is localized and amenable to control by both federal and state law enforcement agencies. Additionally, as in this case a conviction on the substantive count can be obtained.

The fact that specific intent is required for a conviction on a conspiracy count and not on a substantive count is consistent with reason. *U.S. v. Vilhotti*, 452 F.2d 1186 (2nd Cir. 1971) cert. denied, 406 U.S. 947 (1972).

2. A careful analysis of this court's decision in *U.S. v. Freed* 401 U.S. 601 reveals that what was involved was "a regulatory measure in the interest of the public safety" p. 609.

The concurring opinion in *U.S. v. Freed*, 401 U.S. 601, 610, is, it is submitted, dispositive of the issue in

the instant case. For there, Mr. Justice Brennan sets forth the requirement of *mens rea* and concludes at page 616:

> Second, the firearms covered by the Act are major weapons such as machineguns and sawed-off shotguns; deceptive weapons such as flashlight guns and fountain pen guns; and major destructive devices such as bombs, grenades, mines, rockets, and large caliber weapons including mortars, antitank guns, and bazookas. Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it.

CONCLUSION

Under traditional concepts of the common law, scienter is necessary to convict for conspiring to assault. The requirement of specific intent is supported by reason in the *Crimmins* doctrine. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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